Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

FRIEDMAN'S INC. D/B/A FRIEDMAN'S JEWELERS, AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, INC., and AMERICAN BANKERS LIFE ASSURANCE COMPANY OF FLORIDA,

Petitioners,

v.

STATE OF WEST VIRGINIA *EX REL.* JAMES DUNLAP,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, permits a state court to declare an arbitration agreement unenforceable on the grounds that state law favors punitive damages, class actions, and mutuality of obligation to arbitrate.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were Friedman's Inc. d/b/a Friedman's Jewelers, American Bankers Insurance Company of Florida, Inc., American Bankers Life Assurance Co. of Florida, Honorable Irene C. Berger, Circuit Judge for the Thirteenth Judicial Circuit of West Virginia, and James Dunlap. Friedman's Inc. has no parent corporation, and no publicly held company owns 10% or more of Friedman's stock. American Bankers Insurance Company of Florida and American Bankers Life Assurance Company of Florida are wholly-owned subsidiaries of American Bankers Insurance Group, Inc., which is an indirect wholly-owned subsidiary of Fortis, Inc. No publicly-held company owns 10% or more of the stock of American Bankers Insurance Company of Florida or American Bankers Life Assurance Company of Florida.

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PETITION FOR A WRIT OF CERTIORARI

Friedman's Inc. d/b/a Friedman's Jewelers, American Bankers Insurance Company of Florida, Inc., and American Bankers Life Assurance Company of Florida respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia.

OPINIONS BELOW

The opinion of the West Virginia Supreme Court of Appeals (App. 1a-42a) has been designated for publication, but has not yet been assigned a volume and page number in the Southeast Reporter 2d Series. The order of the Circuit Court of Kanawha County, West Virginia (App. 43a-44a) is unreported.

JURISDICTION

The Supreme Court of Appeals of West Virginia filed its opinion on June 13, 2002. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* are set forth in the appendix. App. 47a-49a.

STATEMENT

Although the Federal Arbitration Act was passed over 75 years ago "to reverse the longstanding judicial hostility to arbitration agreements," *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991), that same judicial hostility lives on in West Virginia, which in this case (and others) has eviscerated the federally guaranteed arbitration right.[1]

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[1] *See also Toppings v. Meritech Mortgage Servs., Inc.*, W. Va. No. 30108, slip op. (June 19, 2002) (per curiam); *American Reliable Ins. Co. v. Stillwell*, No. 01-1842 (U.S.), *pet. for cert. filed* June 11, 2002.

1. In 1999, respondent James Dunlap financed the purchase of two rings, in the amount of $412.66, from petitioner Friedman's Inc., a jewelry company that operates more than 600 stores in 22 states, primarily in the Southeastern and Midwestern United States. As part of that transaction with Friedman's, Dunlap agreed to an arbitration clause, which provided:

> All disputes, controversies or claims of any kind or nature between Buyer and Seller, arising out of or in connection with the sale of goods financed or refinanced pursuant to the terms of this Agreement . . . or with respect to negotiation of, inducement to enter into, construction of, performance of, enforcement of, or breach of, effort to collect the debt evidenced by, the applicability of the arbitration clause in, or the validity of this Agreement (or any earlier agreement) . . . shall be resolved by arbitration in the state in which this Agreement is entered into, at a location reasonably near the place where you signed this Agreement, in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator may be entered in any court having jurisdiction thereof. . . . All arbitrators' or mediators' fees shall be equally divided between the parties. Exception to arbitration and mediation: The Seller may exercise its right upon default by Buyer as set forth in the paragraph entitled "default" above, without resort to arbitration or mediation. Nothing in this paragraph shall be construed to prevent either party's use of bankruptcy or repossession, replevin, judicial foreclosure, non judicial foreclosure or any other prejudgment or provisional remedy relating to any collateral, security or property interests, for contractual debts now or hereafter and by either party to the other under this Agreement. No arbitrator may make an award of punitive damages.

App. 10a; *see also* App. 45a-46a (respondent's contract with Friedman's). "[T]he paragraph entitled 'default'" provided that if the Buyer were to die, become insolvent, or go into bankruptcy, or fail to make a timely payment, the Seller is permitted, "at its option and without notice, [to] declare the entire unpaid balance immediately due and payable" and, "to the extent permitted by Applicable Law," repossess the merchandise purchased by the Buyer. App. 9a.

2. On May 4, 2000, despite the presence of this arbitration clause, respondent Dunlap joined another plaintiff, Stephanie Gibson, in filing a putative class-action suit on behalf of themselves and all others similarly situated against petitioners Friedman's, American Bankers Insurance Company of Florida, and American Bankers Life Assurance Company of Florida, as well as a number of individual defendants, in the Circuit Court of Kanawha County, West Virginia. App. 2a-3a. Plaintiffs alleged that Friedman's used an illegal scheme to charge its customers, without their knowledge or consent, for certain insurance in connection with the purchase and financing of jewelry. App. 3a. In Dunlap's case, he alleged the addition of illegal charges in the amounts of $1.48 (for credit life insurance), and $6.96 (for property insurance). App. 3a. This insurance was underwritten by the American Bankers insurance companies. App. 3a.

3. On June 23, 2000, Friedman's and the American Bankers insurance companies moved to compel arbitration and to dismiss or stay all proceedings involving respondent Dunlap. App. 7a. On April 19, 2001, the Circuit Court granted that motion, specifically finding that "the terms of the arbitration clause are not unconscionable." App. 44a. The Circuit Judge added that she was "not persuaded by [Dunlap's] arguments that the arbitration clause is unfair or

invalid," and that "[t]he arguments of judicial economy favor staying this litigation, pending arbitration." App. 44a.[2]

4. Five months after the Circuit Court granted the motion to compel arbitration, Dunlap filed a Petition for Writ of Prohibition with the Supreme Court of Appeals of West Virginia, alleging, *inter alia,* that the Circuit Judge had abused her discretion by finding that the arbitration clause was not unconscionable. App. 11a.

5. On June 13, 2002, the Supreme Court of Appeals granted the requested writ of prohibition, holding that the arbitration clause was unconscionable for three separate reasons.

a. Before reaching its three reasons for declaring the arbitration clause unenforceable, however, the West Virginia court began by addressing Dunlap's argument that the arbitration clause unconscionably "depriv[ed him] of his constitutional right to have a jury trial in the West Virginia circuit court system on his claims against Friedman's *et al.*" App. 22a. Citing Article III, sections 13 and 17 of the West Virginia Constitution, the court noted that "[t]hese constitutional rights — of open access to the courts to seek justice, and to trial by jury — are fundamental in the State of West Virginia," adding that "[t]he constitutional rights to open courts and jury trial serve to sustain the existence of a core social institution and mechanism upon which, it may be said without undue grandiosity, our way of life itself depends." App. 22a-23a. Nonetheless, after an extended discourse upon

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[2] Friedman's, along with the two American Bankers insurance companies, also brought an action under the Federal Arbitration Act, 9 U.S.C. §§ 1-16, in the United States District Court for the Southern District of West Virginia, seeking to compel arbitration of Dunlap's claims against Friedman's. The district court dismissed that action for failure to meet the amount-in-controversy requirement of 28 U.S.C. § 1332(a), and the Fourth Circuit affirmed the dismissal on the basis of the *Rooker-Feldman* doctrine. *See Friedman's Inc. v. Dunlap,* 290 F.3d 191 (4th Cir. 2002).

these "fundamental" rights, the court stopped short of issuing a holding on the point, concluding that, "because other issues are present in the instant case that permit us to rule without addressing this issue, we will for purposes of our decision give no weight to Mr. Dunlap's state constitutional rights to a jury trial in the public court system." App. at 25a.

b. The West Virginia court then turned to its three reasons for holding this arbitration clause unconscionable. *First,* the court held that the clause stating "No arbitrator may make an award of punitive damages" (App. 26a) rendered the arbitration clause unconscionable, because "*every Friedman's customer* is deprived of their right to invoke and employ an important remedy provided by law to punish and deter illegal, willful, and grossly negligent misconduct." App. 26a.

c. *Second,* the court held that the inconsistency of class-action relief with arbitration also rendered the arbitration clause unconscionable, because, "in the contracts of adhesion that are so commonly involved in consumer and employment transactions, permitting the proponent of such a contract to include a provision that prohibits an aggrieved party from pursuing class action relief would go a long way toward allowing those who commit illegal activity to go unpunished, undeterred, and unaccountable." App. 28a. The court thus concluded that "the prohibitions on punitive damages and class action relief that would be the result of the application of the provisions of Friedman's purchase and finance agreement are clearly unconscionable." App. 31a.

d. *Third,* the court then offered, in an extended footnote 12, an "additional and independently adequate groun[d] for our holding herein" (App. 31a) — what it called the "lac[k]" of "even-handedness" in allowing Friedman's to pursue repossession and collection of any deficiency outside the arbitration process in the event of a seller's default: "Friedman's retention of the right to use the courts for its most important remedies, at the same time that it denies that forum

to Mr. Dunlap with respect to his most important remedies, meets our established criteria for unconscionability in the context of a contract of adhesion." App. 31a.

e. The court did reject, for lack of record support, Dunlap's claim that requiring the costs of arbitration to be borne equally by the parties "places such a high financial barrier in the path of any consumers seeking to vindicate their rights that most if not all consumers would be effectively discouraged from ever making the attempt." App. 32a. The court found these contentions "at best speculative and not well-supported in the record." App. 37a.

REASONS FOR GRANTING THE WRIT

The West Virginia Supreme Court of Appeals' decision flouts the FAA, ignores this Court's decisions, and creates or deepens splits of authority on each of the three grounds on which it based its decision. If allowed to stand, the decision below would stand as a significant, perhaps insurmountable, barrier to the enforcement of arbitration agreements not only in West Virginia, but potentially nationwide. This Court should grant certiorari and reverse the decision below.

The FAA exhibits a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem. Hosp. v. Mercury Const. Co.*, 460 U.S. 1, 24 (1983). This Court has repeatedly emphasized that Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements that . . . had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts." *Gilmer*, 500 U.S. at 25; *accord, e.g., EEOC v. Waffle House, Inc.*, 122 S. Ct. 754, 761 (2002); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000). Accordingly, this Court has "rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.'" *Green Tree*, 531 U.S. at 89-90 (quoting *Rodriguez de Quijas v. Shearson/American Express,*

Inc., 490 U.S. 477, 481 (1989)). Thus, whatever reservations they may continue to have about the desirability of arbitral dispute resolution, state courts must enforce valid arbitration agreements: The FAA "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *accord Perry v. Thomas*, 482 U.S. 483, 489 (1987).

The West Virginia Supreme Court of Appeals' decision is precisely the type of generalized attack, motivated by judicial hostility toward arbitration as an adequate means of dispute resolution, that this Court repeatedly has struck down. Acting upon this hostility, the West Virginia court did exactly what this Court unequivocally has held that it may not do: "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). The West Virginia court's purported use of state-law principles to refuse enforcement of the arbitration agreement impermissibly "t[ook] its meaning precisely from the fact that a contract to arbitrate is at issue," and thus "did not comport with [the FAA]." *Perry*, 482 U.S. at 492 n.9.

I. THE DECISION BELOW BOTH CREATES AND DEEPENS SPLITS OF AUTHORITY ON THREE SEPARATE QUESTIONS

In casting about for any possible ground to invalidate arbitration agreements, the West Virginia Supreme Court of Appeals offered three separate reasons for finding this agreement unenforceable. But in so doing, it issued holdings that create a triple conflict with this Court's and lower courts' decisions. It (1) created a split of authority on the question, thought by other courts to have been resolved by this Court in *Gilmer*, of whether parties to an arbitration agreement may agree to relinquish any right to pursue a class action; (2)

deepened a split of authority on the question, thought by the vast majority of courts to have been resolved by this Court in *Mastrobuono*, of whether parties to an arbitration agreement may agree to eliminate punitive damages liability; and (3) deepened a split of authority on the question of whether Section 2 of the FAA preempts state law concerning an arbitration agreement's enforceability when one party retains a right to seek extra-arbitral remedies under certain circumstances. For these reasons, this Court should grant certiorari.

A. The Decision Below Creates A Split of Authority On The Question Of Whether Parties To An Arbitration Agreement May Agree To Relinquish Rights To Pursue Class-Action Litigation

The West Virginia Supreme Court of Appeals' decision is the first by either a state court of last resort or a federal court of appeals to hold that parties to an arbitration agreement may not relinquish rights to pursue class-action litigation. This novel holding not only ignores this Court's *Gilmer* decision, but also creates a direct conflict with decisions of the Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits. This holding also is in marked tension with an opinion of the Alabama Supreme Court.

In *Gilmer*, this Court held that disputes under the Age Discrimination in Employment Act of 1967 ("ADEA") are arbitrable. 500 U.S. at 35. Among the challenges to the arbitration agreement in *Gilmer* was a complaint that its procedures did not "provide for . . . class actions." *Id.* at 32. This Court rejected the challenge. *Id.* The West Virginia Supreme Court of Appeals brushed off *Gilmer* as "not . . . controlling" (App. 29a) because *Gilmer* noted that the arbitration rules governing the agreement at issue might "provide for collective proceedings." 500 U.S. at 32. But the West Virginia court ignored the immediately following sentence in the *Gilmer* opinion, which made plain that the

absence of class-action procedures *does not* provide a ground on which to invalidate an arbitration agreement: "'[E]ven if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Id.* (quoting *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)); *see* 29 U.S.C. § 626(b) (providing in ADEA cases remedies available under 29 U.S.C. § 216, including collective action).

Following *Gilmer*, the Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits all have held that parties may agree in an arbitration agreement to relinquish rights to class-action litigation or other collective proceedings. As the Seventh Circuit held in *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), "[w]hen contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. . . . One of those . . . is the possibility of pursuing a class action." *Id.* at 276. Unless the arbitration agreement provides for a collective proceeding, none will be imposed, nor will the arbitration agreement be voided. *See id.* at 276-77 & n.4; *see also Iowa Grain Co. v. Brown*, 171 F.3d 504, 510 (7th Cir. 1999) ("Because arbitration is based fundamentally on an agreement between the parties . . . the kind of class action contemplated by Fed. R. Civ. P. 23(b) is normally unavailable in arbitration.").

The Third, Fourth, Sixth, and Eleventh Circuits have, in the context of litigation under the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* ("TILA"), likewise refused to void arbitration agreements that do not provide for class-action proceedings. As the Third Circuit stated, "simply because judicial remedies are a part of a law does not mean that Congress meant to preclude parties from bargaining around their availability." *Johnson v. West Suburban Bank*, 225 F.3d 366, 377 (3d Cir.

2000) (citing *Gilmer*), *cert. denied sub nom. Johnson v. Tele-Cash, Inc.*, 531 U.S. 1145 (2001). Thus, arbitration "clauses are effective even though they may render class actions to pursue statutory claims under the TILA . . . unavailable," and even though the TILA's legislative history tends to show "the centrality of class actions to the TILA's effective enforcement." *Id.* at 369, 372. *Accord Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483, 492 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1436 (2002); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 818 (11th Cir. 2001).

The Ninth Circuit relied on *Gilmer* and the Third Circuit's *Johnson* decision to enforce an arbitration agreement that eliminated an employee's right under the Fair Labor Standards Act to a collective action. *Horenstein v. Mortgage Market, Inc.*, No. 99-36125, 2001 WL 502010 at *1 (9th Cir. May 10, 2001). The parties "knowingly signed an agreement to arbitrate their statutory claims [and] accordingly, they abandoned their right to enforce those claims as part of a class action." *Id.*

Though it does not directly conflict with the decision below, the Alabama Supreme Court's decision in *Ex Parte Green Tree Financial Corp.*, 723 So. 2d 6 (Ala. 1998), is in marked tension with it. In *Green Tree*, the Alabama court refused to certify a nationwide class of mobile home purchasers who alleged they had been unlawfully charged for insurance in their loan agreements. *Id.* at 7. The court held, *inter alia*, that individual issues would predominate in any such action, noting specifically that the class would include "persons who signed arbitration agreements." *Id.* at 10. Citing the Seventh Circuit's *Champ* decision, the court observed that "[a]rbitration agreements cannot be forced into the mold of class-action treatment without defeating the parties' contractual rights; a rule of civil procedure providing

for class actions cannot overcome binding arbitration agreements." *Id.* at 10 & n.3.

The West Virginia Supreme Court of Appeals did not mention, much less distinguish, these contravening authorities. The conflict created by the decision below merits this Court's review.

B. The Decision Below Deepens A Split Of Authority On The Question Of Whether Parties To An FAA-Covered Arbitration Agreement May Agree To Preclude Any Award Of Punitive Damages

The West Virginia Supreme Court of Appeals also voided the arbitration agreement in its entirety because the clause specifically provided that "No arbitrator may make an award of punitive damages." App. 14a. In this respect, the decision below ignores this Court's *Mastrobuono* decision and directly conflicts with decisions of the First, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. It is also in marked tension with decisions of the Second Circuit and the Illinois Supreme Court. The decision below accords, however, with a decision of the Alabama Supreme Court. This conflict also merits this Court's attention.

In *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995), this Court held that the FAA preserves for parties to an arbitration agreement the ability freely to include or exclude punitive damages in their arbitrations. There, the arbitration panel awarded punitive damages, and Shearson argued that doing so exceeded the panel's authority. *Id.* at 54-55. The Court noted with approval the respondents' argument that, under the FAA and the reasoning of *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), "the parties to a contract may lawfully agree to limit the issues to be arbitrated by waiving any claim for punitive damages." *Id.* at 58. "On the other hand," the Court noted, the "decisions in *Allied-Bruce*, *Southland*, and *Perry* make clear that if contracting parties

agree to *include* claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration." *Id.* (emphasis in original).

The arbitration agreement at issue in *Mastrobuono* "contain[ed] no express reference to claims for punitive damages," but included a New York choice-of-law provision. 514 U.S. at 59. The Court thus employed general principles of contract interpretation "[t]o ascertain whether [the choice-of-law provision] expresses an intent to include or exclude such claims." *Id.* at 59-63; *see id.* at 71-72 (Thomas, J., dissenting) (agreeing that the issue presented a question of contract law but disagreeing with the majority's finding that the parties intended to allow a punitive award). Furthermore, the Court never suggested that its interpretation of the contract to allow punitive damages was in any way driven by a concern that a contrary interpretation would violate public policy of some sort. *See, e.g,* Restatement (Second) of Contracts § 178 (contracts should be interpreted in a manner consistent with public policy). Hence, *Mastrobuono* stands for the proposition that, under the FAA, the question of whether an arbitration agreement allows punitive damages is simply a question of "interpret[ing] contracts in accordance with the expressed intentions of the parties," as a matter of federal law. 514 U.S. at 57. Under *Mastrobuono*, the "FAA would pre-empt" any state law disallowing the parties' contractual choice. *Id.* at 59.

Before and since *Mastrobuono*, the federal courts of appeals consistently have held that under the FAA the availability of punitive damages under an arbitration agreement is a question of the parties' intent. For example, the Seventh Circuit held prior to *Mastrobuono* that "parties can stipulate to whatever procedures they want to govern the arbitration of their disputes . . . [and] surely can stipulate that punitive damages will not be awarded." *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d

704, 709 (7th Cir. 1994). The Fifth Circuit held after *Mastrobuono* that "[p]rovisions in arbitration agreements that prohibit punitive damages are generally enforceable." *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, ___ F.3d ___, No. 01-60651, 2002 WL 1498721 at *4 n.1 (5th Cir. July 15, 2002). The First, Fourth, Eighth, Tenth, and Eleventh Circuits all likewise agree that parties may agree on the availability or absence of punitive damages in arbitration. *See, e.g, Long v. Silver*, 248 F.3d 309, 319 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 213 (2001); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 939-40 (10th Cir. 2001); *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1189 (11th Cir. 1995); *Raytheon Co. v. Automated Bus. Sys., Inc.*, 882 F.2d 6, 12 (1st Cir. 1989); *Surman v. Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 63 (8th Cir. 1984).[3]

The Ninth Circuit's position appears mixed. In *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056 (9th Cir. 1991), decided before *Mastrobuono*, that court held that the availability of punitive damages in arbitration is a matter of the parties' intent. In *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1995), decided after *Mastrobuono*, the court struck down an arbitration clause on a number of grounds. Among them was a concern that the clause at issue forfeited a "right to recover exemplary damages" expressly contained in the Petroleum Marketing Practices Act. *Id.* at 1247. Even so, as the West Virginia court admitted below, the

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[3] In *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001), the Eighth Circuit held that an invalid arbitration provision limiting punitive damages was severable from the remainder of the agreement. *Id.* at 683. *Gannon*, however, did not retreat from the Eighth Circuit's consistent position that parties may freely bargain for the presence or absence of punitive damages in arbitration. *See Surman*, 733 F.2d at 63; *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163, 1168 n.7 (8th Cir. 1984); *Lee v. Chica*, 983 F.2d 883, 888 (8th Cir. 1993). Indeed, on appeal in *Gannon*, the appellant did "not challenge the [district court's] ruling that the punitive damages clause [was] unenforceable." 262 F.3d at 679.

West Virginia Consumer Credit & Protection Act does not contain a statutory entitlement to punitive damages. App. 26a n.8. Thus, the decision below conflicts with the Ninth Circuit's case law.

The decision below also stands in marked tension with decisions of the Second Circuit and the Illinois Supreme Court. Neither court has held directly that parties may contract away rights to punitive damages in arbitration. But both courts have expressly read *Mastrobuono* as endorsing the practice.

In *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Belco Petroleum Corp.*, 88 F.3d 129 (2d Cir. 1996), which concerned interpretation of a choice-of-law provision, the Second Circuit stated that in *Mastrobuono*, "[t]he Court agreed that, in light of *Volt*, the parties could have included a prohibition against punitive damages in their agreement." *Id.* at 134. The Illinois Supreme Court's decision in *Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 692 N.E.2d 1167 (Ill. 1998), concerned the proper standard by which to review interpretation of an arbitration agreement's terms concerning punitive damages. *Id.* at 1177. There, the court expressly endorsed *Mastrobuono* as allowing parties to "limit the issues to be arbitrated by waiving any claim for punitive damages." *Id.* at 1170.

The West Virginia Supreme Court of Appeals' decision below accords in part, however, with the Alabama Supreme Court's recent decision in *Ex Parte Thicklin*, ___ So. 2d ___, No. 1000224, 2002 WL 27925 (Ala. Jan. 11, 2002). In a split opinion, the Alabama court held that public policy does not allow "a party to contract away its liability for punitive damages, regardless whether the provision doing so was intended to operate in an arbitral or a judicial forum." *Id.* at *8. Accordingly, the court held, "enforcement of th[e] portion of the arbitration agreement [doing so] violates public policy, and its enforcement would be unconscionable." *Id.* (Even so,

the Alabama court — unlike the West Virginia court here — struck only the "no punitive damages" provision but otherwise honored the federal policy embedded in the FAA by compelling arbitration after excising the offending provision. *Id.*) The Alabama court described *Mastrobuono*'s discussion of parties' power to contract out of punitive damages as "not even *dictum*." *Id.* at *8 n.4. Justice See dissented from this portion of the opinion, contending that there was no "authority under state law to excise such a clause from a contract" and that the majority's "rewriting of arbitration provisions to suit the sensibilities of the particular state" violated Section 2 of the FAA. *Id.* at *12 & n.11 (See, J., dissenting).

In summary, the West Virginia Supreme Court of Appeals has joined the Alabama Supreme Court in prohibiting parties from waiving punitive damages in arbitration agreements. Arrayed against these decisions are conflicting opinions from this Court, nine federal courts of appeals, and the Illinois Supreme Court. This Court should grant certiorari to resolve this conflict.

C. The Decision Below Deepens A Split Of Authority On The Question Of Whether Section 2 Of The FAA Preempts State Law Concerning Mutuality Of Obligation To Arbitrate

The decision below exacerbates a conflict on a third question: whether Section 2 of the FAA preempts state law concerning mutuality of obligation to arbitrate. In a lengthy footnote, the West Virginia Supreme Court of Appeals sought to provide an "additional and independently adequate groun[d] for [its] holding." App. 31a n.12. The court relied on its prior decision in *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854 (W. Va. 1998) for the proposition that:

> Where an arbitration agreement entered into as part of a consumer loan transaction contains a substantial waiver of the borrower's rights, including access to courts, while preserving the lender's right to a judicial forum, the

> agreement is unconscionable and, therefore, void and unenforceable as a matter of law.

Id. at 862. Here, the West Virginia court objected to Friedman's reservation of a "right to use the judicial system in the case of a default by Mr. Dunlap" while "den[ying] that forum to Mr. Dunlap" — in effect, voiding the arbitration agreement because the retailer reserved the right to repossess via court action instead of by self-help and the attendant risks of breach of the peace. App. 31a n.12.

In holding that state law concerning mutuality of obligation to arbitrate may be applied to — and here invalidate — FAA-covered arbitration agreements, the decision below conflicts directly with decisions of the Third and Sixth Circuits, as well as the highest courts of Alabama, Texas and South Carolina. It accords, however, with decisions of the Second, Eighth, and Eleventh Circuits, as well as the highest courts of Montana and California.

Section 2 of the FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, while generally applicable concepts of contract law may be relevant to the validity of an FAA-covered arbitration agreement, "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 684 (1996); *accord Allied-Bruce Terminix*, 513 U.S. at 281 ("What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause."); *Perry*, 482 U.S. at 492 n.9 ("A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of § 2]."). At least one commentator has opined that, under these cases, "application of any state law principle establishing a mutuality requirement for arbitration clauses stricter than that governing other

contract clauses would violate the FAA." II I. MacNeil, *et al.*, *Federal Arbitration Law* § 17.4.2 (1999). Nonetheless, the question of whether and how state law governing mutuality of obligation to arbitrate applies to FAA-covered agreements has engendered a deep split of authority.

The Third Circuit in *Harris v. Green Tree Financial Corp.*, 183 F.3d 173 (3d Cir. 1999), dealt with an FAA-covered arbitration clause that allowed a mortgage lender to seek judicial remedies to "enforce a mortgage, deed of trust, or other security agreement relating to the real property secured in a transaction underlying this arbitration agreement." *Id.* at 177. The district court struck down the clause because it "lacked the requisite mutuality and, therefore, was unconscionable." *Id.* at 178. The Third Circuit reversed, holding that "substantive federal law" governed and stood "for the proposition that parties to an arbitration agreement need not equally bind each other with consideration beyond the promise to arbitrate." *Id.* at 180.

The Sixth Circuit held likewise in *Wilson Electrical Contractors, Inc. v. Minnotte Contracting Corp.*, 878 F.2d 167 (6th Cir. 1989). The arbitration clause at issue, undisputedly subject to the FAA, provided that "only Wilson, at the election of Minnotte, [had to] submit all controversies regarding the contract to arbitration." *Id.* at 168. Citing this Court's *Perry* decision, *id.* at 169 n.2, the Sixth Circuit rejected the argument that the clause was unenforceable on mutuality-of-obligation grounds as an argument "pervaded by the old judicial hostility to arbitration." *Id.* at 169. A contrary holding, the court held, would have been "inconsistent with [numerous] decisions of the Supreme Court," including *Perry*. *Id.*

Decisions of the Supreme Courts of Alabama and South Carolina also accord with the Third and Sixth Circuits. In *Ex Parte McNaughton*, 728 So. 2d 592 (Ala. 1998), the Alabama Supreme Court rejected a non-mutuality ground for voiding an arbitration agreement because "[a]lthough the doctrine of

unconscionability/mutuality of remedy purportedly could apply in the nonarbitration context . . . it directly depends on arbitration for its application" because it rests upon concerns about an arbitration agreement causing one party to "waiv[e] his right to a remedy by due process of law . . . and his right of trial by jury." Therefore, the Alabama court held, applying the doctrine would "fl[y] in the face of *Doctor's Associates*, 517 U.S. at 687." 728 So. 2d at 598-99. *See also Green Tree Fin. Corp. v. Wampler*, 749 So. 2d 409, 416 (Ala. 1999) (non-mutuality of obligation to arbitrate "standing alone . . . is not sufficient to warrant a finding of unconscionablility"). When presented with a similar situation, the South Carolina Supreme Court expressly adopted *McNaughton* and rejected a mutuality challenge to an arbitration agreement. *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 364-65 (S.C. 2001).

So, too, the Texas Supreme Court held in *In re FirstMerit Bank, N.A*, 52 S.W.3d 749 (Tex. 2001), that "federal precedent" governs the question of whether a lack of mutuality of obligation to arbitrate can void an arbitration agreement. *Id.* at 757. *FirstMerit* involved an arbitration agreement in a loan document that allowed the lender to seek judicial remedies for certain disputes. *Id.* at 754. The Texas Supreme Court, looking to the "weight of federal precedent," rejected the argument that the terms of the agreement were "unconscionable because they force the weaker party to arbitrate their claims, while permitting the stronger party to litigate their claims." *Id.* at 757.

Like the West Virginia Supreme Court of Appeals below, however, other courts facing enforceability challenges have looked to state law concerning mutuality of obligation to arbitrate. In *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000), which was cited by the court below, the California Supreme Court invalidated non-mutual arbitration clauses contained in a series of FAA-covered employment agreements. In doing so, the court expressly rejected the Alabama Supreme Court's reading of

federal precedent in *McNaughton*, holding that "ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context." *Id.* at 693. The California court thus opined that reliance on state law was proper because "[i]t does not disfavor arbitration to hold that an employer may not impose a system of arbitration on an employee that seeks to maximize the advantages and minimize the disadvantages for itself at the employee's expense." *Id.*

The Montana Supreme Court held similarly in *Iwen v. U.S. West Direct*, 977 P.2d 989 (Mont. 1999). *Iwen* arose from an FAA-covered arbitration clause in an advertising contract that exempted U.S. West from arbitrating collection actions. *Id.* at 993-94. The Montana court acknowledged this Court's precedents holding that state courts "may not craft special rules which apply only to arbitration provisions for the purpose of defeating arbitration." *Id.* at 994. Nonetheless, employing Montana law, the court held the arbitration clause (but not the entire contract) void for lack of mutuality. *Id.* at 996. The court saw in the arbitration clause "a clear example of an arbitration provision that lacks mutuality of obligation, is one-sided, and contains terms that are unreasonably unfavorable to the drafter." *Id.*

The Eleventh Circuit has also looked to state law on this issue. In *Hull v. Norcom, Inc.*, 750 F.2d 1547 (11th Cir. 1985), the court invalidated an FAA-covered arbitration clause "because the parties lack a mutual obligation to arbitrate." *Id.* at 1549. The Eleventh Circuit grounded its decision in New York law. *Id.* *Hull*, however, pre-dated this Court's decisions in *Doctor's Associates*, *Allied-Bruce*, and *Perry*. Moreover, since *Hull*, the New York courts have made clear that New York law does not require mutuality of obligation to arbitrate so long as the contract as a whole is supported by consideration. *See Sablosky v. Edward S. Gordon Co.*, 535 N.E.2d 643, 646 (N.Y. 1989). Still, *Hull* remains as Eleventh Circuit precedent. *See also Bess v. Check Express*, 294 F.3d 1298, 1308 (11th Cir. 2002) (looking to Alabama law

regarding mutuality of obligation to arbitrate, but upholding arbitration agreement).

The Second and Eighth Circuits have also applied state law governing mutuality of obligation to arbitrate in challenges to FAA-covered arbitration agreements. *See Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438 (2d Cir. 1995); *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788 (8th Cir. 1998). In each case, the courts thought themselves bound by choice-of-law provisions to apply state law concerning mutuality of obligation to arbitrate. *See Doctor's Assocs.*, 66 F.3d at 451 (Connecticut); *Barker*, 154 F.3d at 791 (Oklahoma). And in each case, the courts made an *Erie* prediction that state law would not require mutuality of obligation to arbitrate as a predicate to enforceability. *Doctor's Assocs.*, 66 F.3d at 451-53; *Barker*, 154 F.3d at 791-92. Neither court discussed this Court's opinions in *Doctor's Associates*, *Allied-Bruce*, or *Perry*, although the Eighth Circuit opined that a rule requiring mutual obligation to arbitrate would "risk running afoul of the strong federal policy favoring arbitration." *Barker*, 154 F.3d at 792.

In sum, the West Virginia Supreme Court of Appeals decision below thus deepens an existing and acknowledged split of authority on the question whether and how state law governing mutuality of obligation to arbitrate applies to FAA-covered arbitration agreements. Like the other issues raised by the decision below, this issue is most deserving of this Court's review.[4]

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[4] The West Virginia court began its legal analysis by discussing, at some length, whether an arbitration agreement violates the West Virginia constitution's rights to a jury trial and open courts. App. 21a-25a. After several pages of discussion indicating that the court believed that arbitration agreements in and of themselves run afoul of the "fundamental" state constitutional rights "of open access to the courts to seek justice, and to trial by jury" (App. 23a), the court abruptly stopped short of a holding and declared that, "because other issues are present in the instant case that permit us to rule without addressing this issue, we will for purposes of our

decision give no weight to Mr. Dunlap's state constitutional rights to a jury trial in the public court system." App. 25a. To the extent that respondent might seek to defend the decision below on the ground of this curious "non-holding," petitioners note that even this dictum ignored the holding of this Court that the FAA "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration" (*Southland Corp.*, 465 U.S. at 10), and conflicts with a wealth of federal and state court decisions holding that an arbitration agreement necessarily equals a valid waiver of the right to a jury trial. *See, e.g., Snowden*, 290 F.3d at 638 (it is "common sense" that parties waive the right to a jury trial by agreeing to arbitrate); *Burden*, 267 F.3d at 492 ("loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate"); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 368 (7th Cir. 1999) (agreement to arbitrate does not violate the right to a jury trial); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 230-31 (3d Cir. 1997) (same); *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988) (contractual jury waivers are enforceable); *Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist. Ct. of the State of Nevada*, 40 P.3d 405, 408-10 (Nev. 2002) (same); *Ex parte Early*, 806 So. 2d 1198, 1201 (Ala. 2001) (agreement to arbitrate waives the right to a jury trial); *John A. Cookson Co. v. N.H. Ball Bearings, Inc.*, 787 A.2d 858 , 863 (N.H. 2001) (same); *Godrey v. Hartford Cas. Ins. Co.*, 16 P.3d 617, 623-24 (Wash. 2001) (same); *Bryant v. Am. Express Fin. Advisors, Inc.*, 595 N.W.2d 482, 484 (Iowa 1999) (same); *L & R Realty v. Conn. Nat'l Bank*, 715 A.2d 748, 753-55 (Conn. 1998) (same); *Malan Realty Investors, Inc. v. Harris*, 953 S.W.2d 624, 625-26 (Mo. 1997) (same); *Massey v. Farmers Ins. Group*, 837 P.2d 880, 884 (Okla. 1992) (same); *Aufderhar v. Data Dispatch, Inc.*, 452 N.W.2d 648, 653 (Minn. 1990) (same); *Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 912 (Del. 1989) (same); *McKinstry v. Valley Obstetrics-Gynecology Clinic P.C.*, 405 N.W.2d 88, 95 (Mich. 1987) (same); *Madden v. Kaiser Found. Hosp.*, 552 P.2d 1178, 1180 (Cal. 1976) (same); *Nordenstrom v. Swedburg*, 143 N.W.2d 848, 856 (N.D. 1966) (same). *See also Rollings v. Thermodyne Indus., Inc.*, 910 P.2d 1030, 1041-42 (Okla. 1996) (Opala, J., concurring) (FAA preempts any state law "access to courts" ground for invalidating arbitration agreements). *But see Koss v. Edward D. Jones & Co.*, __ P.3d __, No. 00-507, 2002 WL 1293057 at *15-*17 (Mont. June 13, 2002) (FAA does not preempt state law requiring access to jury trial and access to the courts); *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 642 (Fla. 1999) (state's public policy favoring jury trials and access courts provides a reason to construe coverage of an FAA-covered arbitration agreement narrowly). Indeed,

II. THE DECISION BELOW PRESENTS IMPORTANT AND RECURRING ISSUES AND THREATENS TO UNDERMINE THE FEDERAL ARBITRATION ACT

As petitioners have shown, the West Virginia Supreme Court of Appeals' decision freely disregards the FAA's "national policy favoring arbitration agreements," *Southland Corp.*, 465 U.S. at 10, and resurrects the old ways of "judicial hostility to arbitration agreements." *Gilmer*, 500 U.S. at 24. The utter incorrectness of the West Virginia decision below, in and of itself, would merit certiorari: This Court — in just the last three Terms alone — has granted review in a number of cases where the lower courts impermissibly sought to inject "complex," "uncertai[n]," and "bizarre" reasons for avoiding the clear import of agreements to arbitrate. *See, e.g., Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001); *Green Tree*, 531 U.S. at 88-89; *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193, 201 (2000).

But the importance of the issue, and of this Court's review, is not shown merely by the incorrectness of the decision below. The decision below, if left intact, would basically end arbitrations in the State of West Virginia, and impose a serious impediment to interstate commerce, contrary to the policies behind the FAA.

Arbitration clauses are prevalent in modern economic transactions. Last year, the leading association of arbitrators administered arbitrations under more than 200,000 such agreements. American Arbitration Association's 2001 Annual Report at 2, http://www.adr.org/upload/LIVESITE/About/

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because arbitrations are by definition private non-jury proceedings, it is not an overstatement to say that such a holding would end all arbitrations in the State of West Virginia.

annual-reports/AR2001.pdf. By contrast, the thirteen United States Courts of Appeals, in a comparable period, disposed of less than 30,000 cases, a number that of course includes a substantial criminal docket. 2001 Federal Court Management Statistics, at 31 (2002). The decision below threatens to gut the federal arbitration right by channeling these numerous disputes out of private dispute-resolution processes and back into the publicly funded but already-overloaded state and federal judicial systems.

Even beyond the threat to the effectiveness of the public judiciary, the West Virginia court's avowed hostility to arbitration would have dire consequences for interstate and, indeed, international commerce. Arbitration agreements like the one in the contract between Dunlap and Friedman's have become a common feature in business and consumer transactions. Indeed, interstate businesses — such as Friedman's — routinely include arbitration agreements in their contracts in order to assure prompt, inexpensive, and uniform resolution of disputes. *See generally* Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left For State Arbitration Law?*, 21 Hofstra L. Rev. 385, 429-54 (1992); Sen. R. Feingold, *Mandatory Arbitration: What Process Is Due?*, 39 Harv. J. on Legis. 281, 282-84 (2002).

It is thus critical to interstate commerce that parties to arbitration agreements be assured that their agreements will be enforceable regardless of the vagaries, preferences, or hostilities of individual states' laws or judiciaries. A company doing business nationally cannot know in what state it might be sued — though in light of the decision below, Friedman's and other companies can expect to appear with greater frequency in the courts of West Virginia. Even though Section 2 of the FAA does subject arbitration agreements to general contract laws, the FAA does not allow those laws such freewheeling play as to undermine the "declared . . . national policy favoring arbitration." *Southland Corp.*, 465 U.S. at 10;

see, e.g., *Doctor's Assocs.*, 517 U.S. at 684; *Allied-Bruce*, 513 U.S. at 281; *Perry*, 482 U.S. at 492 n.9. The decision below, however, resurrects the precise obstacles to arbitration that this Court has repeatedly held were eradicated when Congress enacted the FAA and made arbitration agreements "valid, irrevocable, and enforceable" as a matter of federal law. 9 U.S.C. § 2.

Finally, there is no question but that these issues are recurring ones. Two of the leading plaintiff-lawyer associations are engaged in a public and concerted attack on arbitration clauses. The American Trial Lawyers Association ("ATLA"), for example, has gone on record to state that "[m]andatory arbitrations [*sic*] schemes are not an acceptable alternative to our civil justice systems and Corporate America should not be allowed to force individuals to sign away such fundamental rights as access to our civil justice system." ATLA, *Mandatory Arbitration: The Next Attack on Consumers' Rights*, http://www.atla.org/homepage/arbi0319.ht. Another ATLA release, *How Companies are Taking Away our Rights!*, catalogues a series of arguments against arbitration clauses, which almost seems to have presaged the West Virginia court's own list of reasons why arbitration clauses are legally invalid. *See* http://www.atla.org/homepage/mandarb.ht; *see also* J. Vail, *Defeating Mandatory Arbitration Clauses*, 36 Trial 70, 70-74 (2000) (ATLA senior counsel; describing as "offensive" a "long line of Supreme Court cases" upholding arbitration agreements and suggesting strategies for attacking them). And Trial Lawyers for Public Justice, which appeared in the courts below in support of respondent, has launched what it calls a "Mandatory Arbitration Abuse Prevention Project," whose aims include attacking arbitration clauses such as the one at issue here. *See* http://www.tlpj.org/key_current_cases.ht. *See generally* National Consumer Law Center with the TLPJ Foundation, *Commercial Arbitration Agreements: Enforceablity and Other Topics* (2001) (two-hundred page manual that "focuses on

how consumers can avoid being forced into arbitration"). These organizations will assure that the issues presented by this petition continue to recur unless and until this Court settles the issues on a national basis.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX

--- S.E.2d ---

SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE of West Virginia ex rel. James Dunlap, Petitioner,

v.

Honorable Irene C. BERGER, Judge of the Circuit Court of Kanawha County, and Friedman's, Inc., dba Friedman's Jewelers, et al., Respondents.

No. 30035.

Submitted: Jan. 8, 2002.
Filed: June 13, 2002.

SYLLABUS BY THE COURT

1. "Unconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court." Syllabus Point 1, *Troy Min. Corp. v. Itmann Coal Co.,* 176 W.Va. 599, 346 S.E.2d 749 (1986).

2. Exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable.

3. The Federal Arbitration Act, 9 U.S.C. Sec. 2 [1947] does not bar a state court that is examining exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public from considering whether the provisions are unconscionable—merely because the prohibiting or limiting provisions are part of or tied to provisions in the contract relating to arbitration.

4. Provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable. In any challenge to such a provision, the responsibility of showing the costs likely to be imposed by the application of such a provision is upon the party challenging the provision; the issue of whether the costs would impose an unconscionably impermissible burden or deterrent is for the court.

STARCHER, Justice.

In the instant case, Mr. James Dunlap,[1] who is a plaintiff below and the petitioner before this Court, claims in a civil lawsuit filed in May of 2000 in the Circuit Court of Kanawha

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[1] Ms. Stephanie Gibson is Mr. Dunlap's co-plaintiff in the case below; her claim is essentially the same as Mr. Dunlap's. However, her purchase and financing agreement document did not contain the language that is at issue in the instant case. The fact that two plaintiffs have joined their claims in one case does not affect our consideration of Mr. Dunlap's petition.

County that Friedman's, Inc., a jewelry store chain doing business in West Virginia ("Friedman's); Friedman's insurance company partners, American Bankers Insurance Company of Florida and American Bankers Life Assurance Company of Florida (together, "American Bankers"); and certain named individuals who are or were managerial employees of Friedman's—all of whom are the defendants below and the respondents in the instant case before this Court (we shall refer to these respondents together as "Friedman's *et al.*")—have been carrying out a systematic, deceptive, and illegal "loan packing" scheme, with the purpose and effect of surreptitiously adding unrequested insurance charges to the cost of consumers' purchases from Friedman's. In Mr. Dunlap's case, allegedly illegal charges in the amounts of $1.48 for credit life insurance and $6.96 for property insurance were added when Mr. Dunlap bought a ring from Friedman's in 1999; we discuss the details of that purchase *infra*.

The circuit court concluded that Mr. Dunlap could not go forward with his lawsuit against Friedman's *et al.* in the circuit court because of certain language in Friedman's purchase and financing agreement document, a form contract that Mr. Dunlap signed when he bought the ring. The circuit court stayed the prosecution of Mr. Dunlap's civil lawsuit against Friedman's *et al.*, and directed Mr. Dunlap (over his objection) to proceed to arbitration proceedings with Friedman's *et al.*, pursuant to language in the purchase and financing agreement document. Challenging the circuit court's order, Mr. Dunlap has petitioned this Court for a writ of prohibition; we conclude that the circuit court's order was erroneous.

I.
Facts & Background

Mr. Dunlap filed suit against Friedman's *et al.* on May 4, 2000. His complaint (we refer here to an amended complaint that the circuit court permitted to be filed) charges that

Friedman's *et al.* have been engaged in an illegal, fraudulent, and unconscionable scheme to charge customers, without the customers' request, knowledge, and/or consent, for credit life insurance, credit disability insurance, and property insurance—all in connection with the purchase and financing of jewelry and/or other consumer goods from Friedman's.

Mr. Dunlap specifically alleges that Friedman's systematically and deliberately directed its employees to conceal and lie about these added charges—going so far as to discharge or threaten to discharge employees who would not go along with the added charges/concealment scheme. Mr. Dunlap has supported his allegations of a comprehensive scheme to defraud consumers with affidavits (filed with his complaint) from former Friedman's employees and customers.

In one of these affidavits, a former Friedman's manager attested:

> I was advised by [a Friedman's trainer] to sell property, life and disability insurance to customers who financed their purchases. I was specifically told to just add the insurance onto the sale . . . . I felt very uncomfortable following these orders. I believed that Friedman's practice of charging consumers a premium for insurance without disclosing it to the consumers was fraudulent, deceitful and wrong . . . . On many occasions, my employees, per Friedman's orders, sold disability, life and property insurance to customers who financed jewelry, and did not disclose to the customer that the insurance was added to the sale.

Another former Friedman's manager attested:

> The computers at our stores were programmed to automatically add on charges for credit life, credit disability and property insurance onto the customer's retail installment contract. In order to remove these charges, the

employee would have to manually delete them. I felt very uncomfortable following these orders. I believed that Friedman's practice of charging consumers a premium for insurance without disclosing it to the consumers was fraudulent, deceitful and wrong.

Another former Friedman's employee attested:

> . . . I was informed by . . . the district manager, that we, as employees of Friedman's Jewelers, Inc. were to add life, disability and property insurance to customer credit applications without disclosing this information to the customer. If we did not do what was requested, we would be fired. He informed me that two people had been dismissed in Roanoke for refusing to do what they asked. . . . I was again informed by . . . the store manager, during a staff meeting that we were to add life, disability and property insurance to customer credit applications without disclosing this information to the customer . . .. When I questioned what should we do if a customer questions the insurance, I was told that we should tell the customer that it was a computer error.

One Friedman's employee quit working for Friedman's "after she was instructed to deceive customers," according to an administrative law judge who ruled that the employee was entitled to receive unemployment compensation benefits. The judge's decision further stated:

> In this case, the employer instructed its employees to use deceptive practices with regards to the sale of property, disability and life insurance to customers. When a customer opened an account to charge jewelry at the store, the employees were told to automatically add a premium based upon the amount of the charge for life, disability and property insurance. They were told not to give the customer a choice, that they were to automatically add it to the cost of the merchandise. They were further advised that if they did not add the insurance, that they would lose their jobs.

Another former Friedman's employee attested:

> Around May 1999, I was informed by . . .the district manager, that we, as employees of Friedman's Jewelers, Inc. were to add life, disability and property insurance to customer credit applications without disclosing this information to the customer. If we did not do what was requested, we would be fired.

In his circuit court lawsuit, Mr. Dunlap seeks to enforce and vindicate his and other consumers' right not to be victimized by such illegal schemes. Specifically, Mr. Dunlap seeks the following relief and remedies from the circuit court: (1) a declaratory judgment declaring that Friedman's, *et al.*'s conduct violated the West Virginia Consumer Credit & Protection Act, *W.Va.Code,* 46A-1-101 *et seq.* ("the Consumer Protection Act"), West Virginia insurance laws, and the Uniform Commercial Code; (2) an injunction ordering Friedman's *et al.* to cease their illegal conduct, to establish an employee training program on consumer protection in West Virginia, and to revise its sales procedures for insurance; (3) certification of a class of persons whose rights have been violated by Friedman's *et al.* in the fashion that Mr. Dunlap's were; (4) court-ordered cancellation of the plaintiffs' and class members' indebtedness to Friedman's *et al.;* (5) judgment to each plaintiff and class member for statutory damages under the Consumer Protection Act for each violation of the Act; (6) judgment for actual, consequential and incidental damages suffered by each plaintiff and member of the class, including damages for emotional distress, annoyance and inconvenience; (6) judgment for punitive damages to each plaintiff and class member; (7) an award of attorneys' fees; (8) pre- and post-judgment interest; and (9) such other relief as the court determines. Mr. Dunlap's causes of action allege violations of the Consumer Protection Act and *W.Va.Code,* 33-12-1(a) [1957] (selling insurance without a license); common law fraud; unconscionability; breach of duty of good faith under *W.Va.Code,* 46-1-203 [1963] (UCC); negligent and wilful,

wanton and intentional misconduct; and civil conspiracy. Mr. Dunlap requested a jury trial.

On June 23, 2000, Friedman's *et al.* moved the Circuit Court of Kanawha County to prohibit Mr. Dunlap from going forward in circuit court with his claims against Friedman's *et al.* and to require Mr. Dunlap to bring any disputes that he has with Friedman's *et al.* to arbitration. The basis of this motion was language contained in the two-page purchase and financing agreement document that Mr. Dunlap signed in connection with his purchase from Friedman's. We shall review this specific language, after generally describing Friedman's purchase and financing agreement document.

The front page of the purchase and financing agreement document is a pre-printed form, containing a number of boxed spaces with printed titles and explanatory language. For each sale or other similar transaction, transaction-specific words and numbers are supposed to be printed in the form's blank spaces (presumably by a computer-driven printer attached to a cash register and ordinarily at the time of the transaction), showing the date of the transaction, the item(s) purchased or returned, any applicable credits or adjustments, and the financing terms, insurance charges, purchase price, interest rate, credits, payment schedule, and other pertinent information about the transaction.

In Mr. Dunlap's case, it appears[2] from the transaction-specific information printed on the front of the Friedman's form that Mr. Dunlap signed, that on or about September 20, 1999, Mr. Dunlap purchased a ring for about $150.00, and that Friedman's "added" to the ring purchase price a $1.48 charge for credit life insurance and $6.96 for property insurance. Mr. Dunlap's signature appears on a pre-printed line on the front of the form, stating that he is "applying" for insurance, and also on a line where he generally agrees to all terms and conditions on both sides of the document. At the bottom of the front of the form is a pre-printed notice that paragraph 14 of the other side of the form includes an alternate dispute resolution procedure, including a requirement for arbitration or mediation. A printed statement says not to sign the form without reading it, or if it contains any blank spaces.

Mr. Dunlap specifically alleges in his complaint that he did not ask for the insurance for which he was charged, that it was not explained to him that there were insurance charges; that the sales clerk simply showed him where to sign his name on the front of the form; and that the form was then placed in an Friedman's envelope, where the information that was actually important to Mr. Dunlap—his monthly payment amount and

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[2] In the copy of the Friedman's purchase and financing agreement document memorializing Mr. Dunlap's ring purchase that was submitted with the petition in the instant case, the transaction-specific words and numbers are misaligned with the blank spaces on the form where the words and numbers should appear, making the financial and other details of the transaction difficult to comprehend from the face of the document. Put another way, the transaction-specific information on the form (at least on the copy submitted to this Court) is not readily comprehensible to an average person who is not already familiar with the details of the transaction. Moreover, the pre-printed parts of the document would probably be seen by the average person as legal gobbledygook. Our discussion *infra* regarding such contracts of adhesion shows that it makes little difference whether they are in fact comprehensible—because people simply don't read them.

the number of payments—was written in a space provided on the outside of the envelope. Additionally, Mr. Dunlap states in an affidavit that none of the language in the actual purchase and financing agreement document was explained to him, including the language that purports to limit his remedies against Friedman's. Mr. Dunlap's allegations in his complaint regarding how insurance charges were automatically printed on the Friedman's form and added to his purchase price without his request are consistent with the previously discussed affidavits regarding the mechanism of Friedman's alleged "loan packing" scheme.

The reverse side of the purchase and financing agreement document form is titled "Additional Terms of Purchase," and contains 14 pre-printed numbered paragraphs, followed by additional unnumbered language. Most of the numbered paragraphs in the document contain standard "boilerplate" language relating to financing, security in the goods purchased, etc., that is not germane to the issues in the instant case. The following language in the document, however, is germane.

Paragraph 3 of the document, titled "DEFAULT," states in pertinent part that if the "Buyer" (Mr. Dunlap) dies, becomes insolvent or goes into bankruptcy, or does not make a timely payment, the "Seller" (Friedman's) may "at its option and without notice, declare the entire unpaid balance immediately due and payable" and "to the extent permitted by Applicable Law" repossess the merchandise that Mr. Dunlap purchased. Additionally, Paragraph 3 says that Mr. Dunlap agrees to pay "all costs incurred in collecting the indebtedness under this Agreement, including, without limitation, reasonable attorney's fees and court costs in an amount not to exceed 15% of the unpaid debt."

Paragraph 14, titled "ALTERNATE DISPUTE RESOLUTION," states in pertinent part:

> All disputes, controversies or claims of any kind or nature between Buyer and Seller, arising out of or in connection with the sale of goods financed or refinanced pursuant to the terms of this Agreement . . . or with respect to negotiation of, inducement to enter into, construction of, performance of, enforcement of, or breach of, effort to collect the debt evidenced by, the applicability of the arbitration clause in, or the validity of this Agreement or any earlier agreement (except as specifically set forth in this paragraph 14 below), shall be resolved by arbitration in the state in which this Agreement is entered into, at a location reasonably near the place where you signed this Agreement, in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator may be entered in any court having jurisdiction thereof . . . . All arbitrators' or mediators' fees shall be equally divided between the parties. Exception to arbitration and mediation: The Seller may exercise its right upon default by Buyer as set forth in the paragraph entitled "default" above, without resort to arbitration or mediation. Nothing in this paragraph shall be construed to prevent either party's use of bankruptcy or repossession, replevin, judicial foreclosure, non judicial foreclosure or any other prejudgment or provisional remedy relating to any collateral, security or property interests, for contractual debts now or hereafter and by either party to the other under this Agreement. No arbitrator may make an award of punitive damages.

Mr. Dunlap argued before the circuit court that any and all provisions in the above-quoted language from the purchase and financing agreement document that purport to limit or prohibit his claims for relief and remedies against Friedman's *et al.*, in a fashion different from that which is provided in West Virginia constitutional, statutory, and common law, are illegal and unconscionable. Mr. Dunlap also argued that any prohibitions or limitations in these provisions do not apply to

his claims against American Bankers, because American Bankers is not mentioned in the purchase and financing agreement document.

On April 19, 2001, the circuit court entered an order that stayed all court proceedings on Mr. Dunlap's claims in circuit court, and required Mr. Dunlap to pursue arbitration with respect to his claims against all of the respondents, pursuant to language in Paragraph 14 of Friedman's purchase and financing agreement document. Mr. Dunlap thereafter sought a writ from this Court to prohibit the enforcement of the circuit court's order, leading to the instant case.

II.
Standard of Review

Prohibition will lie to hear claims relating to a court's jurisdiction or to address non-jurisdictional issues where a court's challenged ruling or action is clearly contrary to law and an appeal would not be as adequate as review in prohibition. *See* Syllabus Point 1, *Hinkle v. Black,* 164 W.Va. 112, 262 S.E.2d 744 (1979); Syllabus Points 1, 2, and 3, *State ex rel. Davidson v. Hoke,* 532 S.E.2d 50, 207 W.Va. 332, (2000) (*per curiam*).

The central issue in the instant case is whether the circuit court should exercise the civil jurisdiction that it would ordinarily have to consider *de novo* the merits of Mr. Dunlap's claims against Friedman's *et al.* and to award all appropriate and legally available relief—or whether the circuit court must forego the exercise of its ordinary civil jurisdiction, and play only the relatively deferential and limited role that courts have when reviewing the results of arbitration, *cf.* Syllabus Points 1 and 2, *Boomer Coal and Coke Co. v. Osenton,* 101 W.Va. 683, 133 S.E. 381 (1926).

In *State ex rel. United, Inc. v. Sanders,* 204 W.Va. 23, 25-26, 511 S.E.2d 134, 136-37 (1998), we recently granted a

"a writ of prohibition to prevent enforcement of the lower court's directive which required United Asphalt to resolve its claims through arbitration." Our use of the writ of prohibition to review the circuit court's action in the instant case is appropriate; state court rules of appellate jurisdiction and procedure are not preempted by the Federal Arbitration Act, 9 U.S.C. Sec. 2 [1947]; *see, e.g., Simmons Co. v. Deutsche Financial Services Corp.*, 243 Ga. App. 85, 532 S.E.2d 436 (2000); *Bush v. Paragon Property, Inc.*, 165 Oregon App. 700, 997 P.2d 882 (2000) (*en banc*).

In Syllabus Point 3, *Troy Min. Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986), we stated: "Unconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court." Additionally, in addressing a motion to compel arbitration in the context of a civil action, it is for the court where the action is pending to decide in the first instance as a matter of law whether a valid and enforceable arbitration agreement exists between the parties. *See* Syllabus Points 1 and 2, *Art's Flower Shop, Inc. v. C & P Telephone Co.*, 186 W.Va. 613, 413 S.E.2d 670 (1991). Thus we review the circuit court's legal determinations *de novo*.

III.
Discussion

A.

The central issue in this case is whether Mr. Dunlap is correct in asserting the unconscionability of certain provisions in Friedman's purchase and financing agreement document. In *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998), this Court discussed the concept of unconscionability in a consumer transaction. We stated:

> "Unconscionability" is a general contract law principle, based in equity, which is deeply ingrained in both the

statutory and decisional law of West Virginia. Of particular importance to this case are the provisions contained in the West Virginia Consumer Credit and Protection Act, *W. Va. Code* § 46A-1-101 *et seq.* (hereinafter "CCPA"), which were specifically designed to eradicate unconscionability in consumer transactions. *W.Va.Code* § 46A-2-121 (1996) of the CCPA provides, in relevant part:

> (1) With respect to a transaction which is or gives rise to a consumer credit sale, consumer lease or consumer loan, if the court as a matter of law finds:
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> (a) The agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement, or
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> (b) Any term or part of the agreement or transaction to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or may enforce the remainder of the agreement without the unconscionable term or part, or may so limit the application of any unconscionable term or part as to avoid any unconscionable result.
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> * * *

The legislature in enacting the West Virginia Consumer Credit and Protection Act, *W.Va.Code,* 46A-1-101, et seq., in 1974, sought to eliminate the practice of including unconscionable terms in consumer agreements covered by the Act. To further this purpose the legislature, by the express language of *W.Va.Code,* 46A-5-101(1), created a cause of action for consumers and imposed civil liability on creditors who include unconscionable terms that violate *W.Va.Code,* 46A-2-121 in consumer agreements.

* * *

> The basic test is whether, in the light of the background and setting of the market, the needs of the particular trade or case, and the condition of the particular parties to the conduct or contract, the conduct involved is, or the contract or clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time the conduct occurs or is threatened or at the time of the making of the contract.

[*See* Uniform Consumer Credit Code, § 5.108 comment 3, 7A U.L.A. 170 (1974).] The drafters explained further that "[t]he particular facts involved in each case are of utmost importance since certain conduct, contracts or contractual provisions may be unconscionable in some situations but not in others." *Id.*

Arnold v. United Companies Lending Corp., 204 W.Va. 229, 234-35, 511 S.E.2d 854, 859-60 (1998) (citations and footnotes omitted).

Guided by the foregoing principles, we shall proceed to examine Mr. Dunlap's claim that the provisions of Friedman's purchase and financing agreement document that the circuit court relied on are unconscionable.[3]

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[3] Because these provisions involve or relate to arbitration, the Federal Arbitration Act, 9 U.S.C. Sec. 2 [1947] ("FAA") is applicable. The FAA provides that contracts to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Under the FAA, a claim of unconscionability is available to a party contesting the validity and enforceability of a contractual provision that requires submission of disputes to arbitration. *Doctors' Associates, Inc. v. Casarotto,* 517 U.S. 681, 687, 116 S.Ct. 1652, 1656, 134 L.Ed.2d, 902, 908 (1996) ("generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA].").

A pre-dispute agreement to use arbitration as an alternative to litigation in court may be enforced pursuant to the FAA only when arbitration,

although a different forum with somewhat different and simplified rules, is nonetheless one in which the arbitral mechanisms for obtaining justice permit a party to fully and effectively vindicate their rights. As the Supreme Court stated in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647, 1652, 114 L.Ed.2d 26, 27 (1991): "[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." (citation omitted); *see Paladino v. Avnet Computer Technologies*, 134 F.3d 1054, 1059 (11th Cir. 1998) ("This is so because 'the beneficiaries of public statutes are entitled to the rights and protections provided by the law,' including 'all of the types of relief that would otherwise be available in court.'" (citations omitted); *see also Cole v. Burns Intern. Security Services*, 105 F.3d 1465, 1482 (D.C.Cir. 1996).

In *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 313 (6th Cir. 2000), the court stated:

> [E]ven if arbitration is generally a suitable forum for resolving a particular statutory claim, the specific arbitral forum provided under an arbitration agreement must nevertheless allow for the effective vindication of that claim. Otherwise, arbitration of the claim conflicts with the statute's purpose of both providing individual relief and generally deterring unlawful conduct through the enforcement of its provisions.

See also Paladino, supra, 134 F.3d at 1062 (Cox, J. concurring, for a majority of the court) (the arbitrability of claims "rests on the assumption that the arbitration clause permits relief equivalent to court remedies. . . . When an arbitration clause has provisions that defeat the remedial purpose of the statute . . . the arbitration clause is not enforceable.") (citing *Cole, supra*); *Graham Oil v. ARCO Products Co.*, 43 F.3d 1244, 1247-48 (9th Cir.1994) (invalidating an arbitration agreement that required a claimant to forfeit rights and benefits guaranteed by the Petroleum Marketing Practices Act, including imposing a limit on the recovery of punitive damages and attorneys' fees and a one- year statute of limitations); *Parrett v. City of Connersville, Inc.*, 737 F.2d 690, 697 (7th Cir. 1984) (holding that arbitration offended due process where arbitrator could not award full common law damages nor prevent harm to plaintiff before it occurred); *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 256 (S.D.N.Y. 1998) ("arbitration must allow remedies central to the statutory scheme . . . [and] sufficient to satisfy statutory purposes"); *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 469 (S.D.N.Y. 1997) (voiding provision of arbitration

B.

First, however, we observe that the purchase and financing agreement document that Mr. Dunlap signed was a "contract of adhesion"—and because this term is sometimes used in an imprecise or confusing fashion, a few words of clarification are in order.

In *American Food Management, Inc. v. Henson,* 105 Ill. App.3d 141, 145, 434 N.E.2d 59, 62-63, 61 Ill. Dec. 122, 126 (1982), the court quoted Professor Corbin regarding contracts of adhesion:

> "Adhesion contracts" include all "form contracts" submitted by one party on the basis of this or nothing [* * *] Since the bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts, a rule automatically invalidating adhesion contracts would be completely unworkable. Instead courts engage in a process of judicial review. . . . Finding that there is an adhesion contract is the beginning point for analysis, not the end of it; what courts aim at doing is distinguishing good adhesion

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agreement that disallowed attorneys' fees to prevailing plaintiff in Title VII claim after concluding that "contractual clauses purporting to mandate arbitration of statutory claims . . . are enforceable only to the extent that the arbitration preserves the substantive protections and remedies afforded by the statute."); *LaChance v. Northeast Pub., Inc.,* 965 F.Supp. 177, 185 (D.Mass.1997) (allowing plaintiff to pursue judicial claim under the Americans with Disabilities Act where arbitration agreement did not authorize arbitrator to provide remedy of 'reasonable accommodation' which plaintiff was entitled to pursuant under the Act). This reasoning extends not only to protect a party's right to seek and obtain all of the remedies that are afforded by law under specific statutory claims, but also to protect a party's right to fully and effectively vindicate rights that are secured by the common law for the benefit of citizens generally—such as the right to be free of oppression and fraud.

contracts which should be enforced from bad adhesion contracts which should not.[4] *Id.*

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[4] Other authorities similarly recognize that in a contract of adhesion, a party's

> "contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood in a vague way, if at all." Such standardized contracts have been described as those in which one predominant party will dictate its law to an undetermined multiple rather than to an individual. They are said to resemble a law rather than a meeting of the minds.

Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 389, 161 A.2d 69, 86 (1960) (citations omitted). *See also Boase v. Lee Rubber & Tire Corp.*, 437 F.2d 527, 530 (3d Cir. 1970) ("The originator of the term 'adhesion contract' . . . defined such agreements as those in which one predominant unilateral will dictate its law to an undetermined multitude rather than to an individual * * * as in all employment contracts of big industry * * * and all those contracts which, as the Romans said, resemble a law much more than a meeting of the minds [citations omitted].")

In *Neal v. State Farm Ins. Companies*, 188 Cal. App. 2d 690, 694, 10 Cal. Rptr. 781, 784 (1961), the court stated:

> Commentators have characterized the type of agreement before us as a "contract of adhesion." . . . Such an agreement does not issue from that freedom in bargaining and equality of bargaining which are the theoretical parents of the American law of contracts. Yet, today, the impact of these standardized contracts can hardly be exaggerated. "Most contracts which govern our daily lives are of a standardised [sic] character. We travel under standard terms, by rail, ship, aeroplane, or tramway. We make contracts for life or accident assurances under standardised [sic] conditions. We rent houses or rooms under similarly controlled terms; authors or broadcasters, whether dealing with public or private institutions, sign standard agreements; government departments regulate the conditions of purchases by standard conditions." [citations omitted].

In *Broemmer v. Abortion Services of Phoenix, Ltd.*, 173 Ariz. 148, 151, 840 P.2d 1013, 1016 (1992), the court stated:.

> The conclusion that [a] contract was one of adhesion is not, of itself, determinative of its enforceability. "[A] contract of adhesion is fully enforceable according to its terms [citations omitted] unless certain

The author of this opinion recently discussed contracts of adhesion in a separate concurring opinion in *Mitchell v. Broadnax,* 208 W.Va. 36, 52, 537 S.E.2d 882, 898 (2000) (Starcher, J., concurring):

> The drafters of the *Restatement of Contracts Second,* in their discussions regarding contracts of adhesion like an insurance policy, recognized that:
>
> > A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms. One of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms. Employees regularly using a form often have only a limited understanding of its terms and limited authority to vary them. Customers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form

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other factors are present which, under established legal rules—legislative or judicial— operate to render it otherwise." *Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 820 171 Cal. Rptr. 604, 611, 623 P.2d 165, 172 (1981) (footnotes omitted). To determine whether this contract of adhesion is enforceable, we look to two factors: the reasonable expectations of the adhering party and whether the contract is unconscionable. As the court stated in *Graham:*

Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or "adhering" party will not be enforced against him. [citations omitted] The second—a principle of equity applicable to all contracts generally—is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or "unconscionable."

> and to the tacit representation that like terms are being accepted regularly by others similarly situated. *But they understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose* [citation omitted, emphasis in original].

In a number of cases, this Court has considered exculpatory provisions in such contracts of adhesion that would if applied effectively limit a party's legal exposure, accountability, or liability in a fashion that would otherwise not exist under general law. A review of these cases shows that such exculpatory provisions in contracts of adhesion are given close scrutiny, with respect to both their construction and their potential for unconscionability, particularly where rights, remedies and protections that exist for the public benefit are involved.

For example, we held in *Murphy v. North American River Runners,* 186 W.Va. 310, 316, 412 S.E.2d 504, 510 (1991), reviewing a form waiver of liability, that "a general clause in an exculpatory agreement or anticipatory release exempting the defendant from all liability for any future negligence will not be construed to include intentional or reckless misconduct or gross negligence, unless such intention clearly appears from the circumstances." Similarly, in Syllabus Point 3 of *Auber v. Jellen,* 196 W.Va. 168, 469 S.E.2d 104 (1996) (*per curiam*), we held that "[a]mbiguous provisions in an insurance policy, especially a policy having the qualities of a contract of adhesion, are to be construed against the insurer and in favor of the insured."

In *Hill v. Joseph T. Ryerson & Son, Inc.,* 165 W.Va. 22, 38-39, 268 S.E.2d 296, 307 (1980), upholding a lower court's refusal to enforce an exculpatory provision in a form purchase agreement document, we noted that

> . . . [the sale] was handled in a routine fashion. There is nothing in the record to suggest that there was any advance bargaining between Ryerson and U.S. Steel as to the terms

of the sale and, in particular, as to the exculpatory language. The record does not demonstrate that any price concessions were given in return for the exculpatory provision. It does not appear that any formal contract was signed by the parties in advance of the sale, but rather that the pipe order was placed by Ryerson with U.S. Steel by a written purchase order on a printed form prepared by Ryerson. U.S. Steel subsequently acknowledged the purchase order by its order acknowledgement form which contained certain conditions, including the exculpatory clause, on its reverse side. The initial purchase order of Ryerson contained conditions which were inconsistent with the exculpatory language contained on the U.S. Steel acknowledgement of order form. This fact, when coupled with the absence of any evidence to demonstrate that there had been any bona fide bargaining over the terms and conditions of the sale, compels us to conclude that the exculpatory language asserted by U.S. Steel was not an essential part of the sale. The trial court was thus correct in denying to U.S. Steel the benefit of the exculpatory clause.

This Court's close scrutiny of exculpatory provisions in contracts of adhesion—particularly those that would unconscionably impair rights that are afforded under the law designed to protect the public—is reinforced by the public policy of this State, as enacted by the Legislature. For example, in Syllabus Point 2 of *U.S. Life Credit Corp. v. Wilson,* 171 W.Va. 538, 301 S.E.2d 169 (1982), we recognized that the "legislature in enacting the West Virginia Consumers Credit and Protection Act, W.Va. Code, 46A-1-101, *et seq.,* in 1974, sought to eliminate the practice of including unconscionable terms in consumer agreements covered by the Act." *See also W.Va. Code,* 46A-6-107 [1974], which prohibits and voids the attempted waiver in consumer transactions of warranties, and any remedies for the breach of warranties. Such consumer agreements and transactions, of course, ordinarily involve contracts of adhesion.

Another example of our law's disfavoring of exculpatory provisions in adhesion contracts that derogate public rights may be found in *Teller v. McCoy,* 162 W.Va. 367, 253 S.E.2d 114 (1978), where this Court held that in residential housing leases, the waiver of the implied warranty of habitability is prohibited as against public policy.

In *Bd. of Ed. v. W. Harley Miller,* 160 W.Va. 473, 486, 236 S.E.2d 439, 447 (1977), former Justice Richard Neely pointed out the strong potential for unconscionability that exists in connection with exculpatory provisions in contracts of adhesion. He stated:

> In real life we can envisage . . . provisions being imposed upon consumers in contract situations where consumers are totally ignorant of the implications of what they are signing, and where consumers bargain away many of the protections which have been secured for them with such difficulty at common law.

Based on all of the foregoing and in fidelity to the approach that we have long taken in this area, we recognize and hold that exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable.[5]

C.

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[5] Because unconscionability is an equitable matter and must in the final analysis be determined on a case-by-case basis, a rule that admits of no exceptions is not appropriate. However, a rebuttable presumption is consistent with public policy and retains the flexibility that a court of equity requires.

Mr. Dunlap argues that several prohibitions on and/or limitations of his rights and remedies—that are part of Paragraph 14 in Friedman's purchase and financing agreement document—are unconscionable exculpatory provisions in a contract of adhesion.[6]

Mr. Dunlap identifies, as a threshold prohibition or limitation, the deprivation of his constitutional right to have a jury trial in the West Virginia circuit court system on his claims against Friedman's *et al.*

Mr. Dunlap has a fundamental constitutional right to use West Virginia's court system to seek justice. The *West Virginia Constitution,* Article III, § 17 states:

> The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

And the *West Virginia Constitution,* Article III, § 13 states:

> In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit in a court of limited jurisdiction

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[6] Mr. Dunlap also asserts that the limitations on his rights and remedies that were included in Friedman's purchase and financing agreement document are unenforceable because Mr. Dunlap was not actually aware of and did not consciously agree to the limiting provisions. Friedman's *et al.* reply that the language relating to these limitations was "prominently displayed" on the document form, and was accompanied by a written warning to "be sure to read all of this document." As our discussion of contracts of adhesion *supra* shows, Friedman's *et al.*'s reliance on a "written warning" misses the point. The legal enforceability *vel non* of exculpatory provisions in contracts of adhesion has little to do with whether there are self-serving caveats in a document that is not going to be read, and everything to do with whether the provisions would operate to deprive people of important rights and protections that the law secures for them.

> a jury shall consist of six persons. No fact tried by a jury shall be otherwise reexamined in any case than according to rule of court or law.

These constitutional rights—of open access to the courts to seek justice, and to trial by jury—are fundamental in the State of West Virginia. Our constitutional founders wanted the determinations of what is legally correct and just in our society, and the enforcement of our criminal and civil laws—to occur in a system of open, accountable, affordable, publicly supported, and impartial tribunals—tribunals that involve, in the case of the jury, members of the general citizenry. These fundamental rights do not exist just for the benefit of individuals who have disputes, but *for the benefit of all of us*. The constitutional rights to open courts and jury trial serve to sustain the existence of a core social institution and mechanism upon which, it may be said without undue grandiosity, our way of life itself depends.

We have recognized, of course, that the constitutionally-enshrined and fundamental rights to assert one's claims for justice before a jury in the public court system may be the subject of a legally enforceable waiver. *See, e.g., Stephenson v. Ashburn,* 137 W.Va. 141, 70 S.E.2d 585 (1952). In *Moon v. Michael Koslow Const., Inc.,* 193 W.Va. 673, 676, 458 S.E.2d 610, 613 (1995), we said:

> Koslow did not waive its right to a trial by jury. In its answer to the Moons' complaint, a jury trial was demanded. Furthermore, at the pretrial conference, Koslow made a timely objection to the circuit court's decision to refer the case to a special commissioner. Rule 38(a) of the Rules of Civil Procedure provides that "[t]he right of trial by jury as declared by the Constitution or statutes of the State shall be preserved to the parties inviolate."

And of course, our cases involving arbitration recognize the waiver of the right to go to court in the first instance that is

inherent in consent to an arbitral process, *see Bd. of Ed. v. W. Harley Miller Inc., supra.*

However, as we stated in Syllabus Point 2 of *State ex rel. May v. Boles,* 149 W.Va. 155, 139 S.E.2d 177 (1964): "Courts indulge every reasonable presumption against waiver of a fundamental constitutional right and will not presume acquiescence in the loss of such fundamental right." *See also Woodruff v. Bd. of Tru. of Cabell Huntington,* 173 W.Va. 604, 611, 319 S.E.2d 372, 379 (1984), holding that the *West Virginia Constitution,* Article III, § 1 is "more stringent in its limitation on waiver [of fundamental constitutional rights] than is the federal constitution."

In the instant case, Friedman's *et al.* argue that the Federal Arbitration Act ("FAA"), 9 U.S.C. Sec. 2 (1947), categorically precludes Mr. Dunlap from invoking or relying to any degree upon his West Virginia state constitutional rights to seek justice in a public court and to have a jury trial on all issues so triable.

Interpreting the FAA, the Supreme Court has held that states may not single out arbitration for disfavor or special scrutiny simply because arbitration is a "different forum" than the traditional public court system. *See generally Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) (holding that the FAA invalidated a state statute that required contractual terms regarding arbitration to be prominently displayed in the contract, but not requiring such display for other language).

Because complex issues of federalism are implicated, we do not believe that in deciding the instant case we should unnecessarily reach the issue of to what extent, under the FAA, West Virginia's constitutional policy giving her citizens the waiveable entitlement to seek justice in the public court system may permissibly factor into judicial scrutiny of the

conscionability of a provision in a contract of adhesion purporting to waive that entitlement.[7]

Rather, because other issues are present in the instant case that permit us to rule without addressing this issue, we will for purposes of our decision give no weight to Mr. Dunlap's state constitutional rights to a jury trial in the public court system.

D.

Mr. Dunlap also asserts that the language of Friedman's purchase and financing agreement document contains, in connection with the document's arbitration provision, other impermissibly unconscionable limitations on his rights and remedies under laws that exist for the protection of the public. We shall primarily address two asserted limitations—punitive damages and class action relief.

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[7] In the criminal law context, *in State v. Neuman,* 179 W.Va. 580, 371 S.E.2d 77 (1988) this Court stated at Syllabus Point 5:

Certain constitutional rights are so inherently personal and so tied to fundamental concepts of justice that their surrender by anyone other than the accused acting voluntarily, knowingly, and intelligently would call into question the fairness of a criminal trial.

Similarly, in *State v. Eden,* 163 W.Va. 370, 377, 256 S.E.2d 868, 873 (1979), we stated: . . . [W]aiver of a constitutional right is not implied to be lightly regarded, and if such a waiver is to be implied at all, it can only be in situations in which it is clear that the accused has not only a full knowledge of all facts and of his rights, but a full appreciation of the effects of his voluntary relinquishment. [citations omitted.]

Absent concerns raised by the applicability of the FAA, we see no reason why a strict "knowing and intelligent waiver" standard should not ordinarily apply to the waiver of the rights to a jury trial in the public court system. (If a "knowing and intelligent" waiver of uninsured motorist's coverage is required for such a waiver to be effective, *see* Syllabus Point 2, *Riffle v. State Farm Mut. Auto. Ins. Co.,* 186 W.Va. 54, 410 S.E.2d 413 (1991), such a standard should logically apply to the waiver of important constitutional rights.)

Paragraph 14 of the Friedman's purchase and financing agreement document provides that "No arbitrator may make an award of punitive damages." As previously noted, Mr. Dunlap's claims against Friedman's *et al.* include a request for statutory and common-law punitive and penalty damages that under West Virginia law would be potentially available to Mr. Dunlap (and other putative class members) if they were to prevail on a claim of systematic illegal, intentional, and/or fraudulent misconduct by Friedman's *et al.*[8]

It is axiomatic that when consumers, employees, etc. are the victims of illegal, wilfully and wantonly wrongful, and/or fraudulent misconduct, the social remedy of punitive and penalty damages may be a powerful tool—for the benefit of the plaintiff and for the benefit of society in general—"to punish the wrongdoer and to deter the commission of similar offenses in the future [,]" *Burgess v. Porterfield,* 196 W.Va. 178, 182, 469 S.E.2d 114-118 (1996).

In the instant case, the intended effect of the "no punitive damages" provision that is included in Paragraph 14 of Friedman's purchase and financing agreement document is that *every Friedman's customer* is deprived of their right to invoke and employ an important remedy provided by law to punish and deter illegal, willful, and grossly negligent misconduct—and that Friedman's would be categorically shielded from any liability for such sanctions, regardless of Friedman's level of wrongdoing.[9]

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[8] *W.Va.Code,* 46A-5-101 [1974] authorizes statutory penalty damages of $100.00 to $1,000.00 for each violation of the Consumer Protection Act. A plaintiff who proves common-law fraud may recover punitive damages, *Muzelak v. King Chevrolet,* 179 W.Va. 340, 345, 368 S.E.2d 710, 715 (1988).

[9] *Cf. Smithson v. U.S. Fidelity & Guar. Co.,* 186 W.Va. 195, 202, 411 S.E.2d 850, 857 (1991), we held that an insurance company could not rely upon a claim that arbitration had been agreed to between the parties to attempt to insulate itself from damages for bad faith settlement practices.

Mr. Dunlap also argues that his ability to fully pursue his legal rights and remedies is unconscionably limited by the terms of Friedman's purchase and financing agreement document, because Mr. Dunlap could not prosecute his claims for class action relief in arbitration.

Class action relief—including the remedies of damages, rescission, restitution, penalties, and injunction—is often at the core of the effective prosecution of consumer, employment, housing, environmental, and similar cases. In *McFoy v. Amerigas, Inc.*, 170 W.Va. 526, 533, 295 S.E.2d 16, 24 (1982), this Court stated that: "[i]n general, class actions are a flexible vehicle for correcting wrongs committed by large-scale enterprise upon individual consumers [;]." This apt and succinct description of a principal value of class action litigation is directly applicable to Mr. Dunlap's claims in the instant case.

In Mr. Dunlap's case, the total of $8.46 in insurance charges that Friedman's added to his purchase price by Friedman's is precisely the sort of small-dollar/high volume (alleged) illegality that class action claims and remedies are effective at addressing. In many cases, the availability of class action relief is a *sine qua non* to permit the adequate vindication of consumer rights.

As the United States Supreme Court stated in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct. 2231, 2246, 138 L.Ed.2d 689, 709 (1997), "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor (citations omitted)." *See also Riverside v. Rivera*, 477 U.S. 561, 575 (1986): " 'If the citizen does not have the resources, his day in court is denied him; the . . . policy which he seeks to assert and

vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.' 122 Cong.Rec. 33313 (1976) (remarks of Sen. Tunney)."

Thus, in the contracts of adhesion that are so commonly involved in consumer and employment transactions, permitting the proponent of such a contract to include a provision that prevents an aggrieved party from pursuing class action relief would go a long way toward allowing those who commit illegal activity to go unpunished, undeterred, and unaccountable.

Friedman's *et al.* do not dispute Mr. Dunlap's assertion that he would not be able to obtain punitive or penalty damages, or assert class action claims and obtain class relief, in an arbitration proceeding. Friedman's *et al.* claim, however, that the FAA's policy prohibiting states from disfavoring the arbitral forum prohibits Mr. Dunlap from asserting a claim that the arbitral forum is inadequate because of a lack of punitive damages or class action relief in that forum.

Friedman's points to the case of *Gilmer v. Interstate Johnson Lane Corp.,* 500 U.S. 20, 111 S.CT. 1647, 114 L.Ed.2d 26 (1991) *supra,* where the Supreme Court upheld the enforced arbitration of a claim brought under the Federal Age Discrimination in Employment Act (ADEA). In *Gilmer,* the plaintiff had agreed when he registered as a securities dealer to use a specialized New York Stock Exchange (NYSE) arbitration forum for all disputes arising out of his employment. Before the Supreme Court, the plaintiff in *Gilmer* asserted as one of several generalized criticisms of the adequacy of arbitration in his case that class action relief was not available in arbitration. The Court's opinion in *Gilmer* principally focused on whether the FAA could cover statutory ADEA claims at all; the opinion also held in a brief discussion that a *possible* lack of class action relief in the NYSE arbitral forum would not itself necessarily render that forum inadequate to vindicate the particular ADEA claim made by

the plaintiff in *Gilmer*. (The Court also referred to the NYSE forum as "conciliation." *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. at 32, 111 S.Ct. at ____, 114 L.Ed.2d at ____. (1991)).

We do not think that *Gilmer* is controlling in support of Friedman's *et al.*'s argument. The plaintiff in *Gilmer* raised an alleged lack of class action remedies in arbitration as part of a facial and generalized challenge to the applicability of the FAA to any and all claims arising under the ADEA. The Court in *Gilmer* did not rule out the possibility that "collective [class action] relief" could be available in the specialized NYSE arbitration proceedings. *Gilmer,* 500 U.S. at 32, 111 S.Ct. at 16___, 114 L.Ed.2d at ____ (1991). Additionally, the Court in *Gilmer* was interpreting a federal statute that the Court held would "continue to serve both its remedial and deterrent function" in the possible absence of class action relief. 500 U.S. at 28, 111 S.Ct. at 1653, L.Ed.2d at 38 (1991). It does not appear that the plaintiff in *Gilmer* was, like Mr. Dunlap, an ordinary consumer or employee who had simply signed a boilerplate form; rather, the plaintiff in *Gilmer* was enrolling in a distinctive profession and actually agreed to use a specialized tribunal established to govern the conduct of that profession. The Court in *Gilmer* did not address the issue of whether preclusion of class action relief would have the effect of broadly shielding wrongdoers from full and effective accountability for their misconduct—which is the situation in the instant case. Moreover, a host of federal cases decided both prior to and following *Gilmer, see* note 3 *supra,* have recognized that if an arbitral forum substantially denies a party the rights and remedies that are provided by laws designed to protect and benefit the public, the FAA does not operate to require that those rights be surrendered. This rule must particularly apply to purported waivers of such rights and protections that are contained in a form contract of adhesion.

In the instant case, in contrast to *Gilmer,* a consumer is seeking to use well-settled principles of state law to challenge

and remedy an allegedly widespread and illegal practice of defrauding thousands of consumers. The consumer signed a contract of adhesion containing provisions that would bar him from utilizing two remedies—punitive damages and class action relief—that are essential to the enforcement and effective vindication of the public purposes and protections of underlying the law.[10] For these reasons, we do not accept the argument that the *Gilmer* case prohibits Mr. Dunlap in the instant case from asserting a lack of class action relief as an unconscionable limitation of his remedies against Friedman's *et al.*[11]

Based on all of the foregoing, we hold that the Federal Arbitration Act, 9 U.S.C. Sec. 2 [1947] does not bar a state court that is examining exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public from considering whether the provisions are unconscionable—merely because the prohibiting or limiting

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[10] We note that Rule 23 of the *West Virginia Rules of Civil Procedure*, which establishes the procedures for invoking the power of a court to award class action relief, has the force and effect of a statute. Syllabus Point 3, *State v. Mason*, 157 W.Va. 923, 205 S.E.2d 819 (1974).

[11] *Gilmer* did not deal with the issue of punitive damages. Friedman's *et al.* argue that Mr. Dunlap does not have an inviolate right to such damages, and therefore cannot claim that the Friedman's contract's bar on such damages is unconscionable. Obviously, Mr. Dunlap has no *absolute* entitlement to such damages, but he does under West Virginia law have an legal entitlement to them, *if* he can prove their legal basis. The question is whether Friedman's—by placing limiting language in an adhesive contractual provision relating to arbitration—may absolutely and categorically shield itself (and others) from an important sanction that is provided by West Virginia law for the benefit of the public. Our answer is that Friedman's cannot do so.

provisions are part of or tied to provisions in the contract relating to arbitration.

In the instant case, we conclude that the prohibitions on punitive damages and class action relief that would be the result of the application of the provisions of Friedman's purchase and finance agreement are clearly unconscionable.[12]

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[12] Mr. Dunlap also claims that Friedman's purchase and financing agreement is unconscionable because it lacks even-handedness with respect to who may invoke the arbitral forum and who may use the court system, pointing out that Friedman's contract preserves Friedman's right to use the judicial system in the case of a default by Mr. Dunlap—to repossess the jewelry and to collect any deficiency, which are the primary enforcement tools of a seller/financer. Mr. Dunlap argues that Friedman's purchase and financing agreement document thus preserves for Friedman's the ability to use the court system to enforce the rights that are most important to Friedman's and at the same time gives Friedman's the ability to use the arbitral forum to limit a consumer's right to impose penalties and remedies against illegal conduct.

Confronted with a similar provision that retained significant rights to use the court system for a consumer lender, but denied the right to invoke the power of the court system to a borrower, we held in Syllabus Point 5, *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998) that:

> Where an arbitration agreement entered into as part of a consumer loan transaction contains a substantial waiver of the borrower's rights, including access to the courts, while preserving the lender's right to a judicial forum, the agreement is unconscionable and, therefore, void and unenforceable as a matter of law.

We agree that Friedman's retention of the right to use the courts for its most important remedies, at the same time that it denies that forum to Mr. Dunlap with respect to his most important remedies, meets our established criteria for unconscionability in the context of a contract of adhesion, and this reason provides additional and independently adequate grounds for our holding herein.

We also observe that neutrality in the selection and composition of any forum or tribunal is essential to the legal validity of contractual provisions providing for dispute resolution mechanisms, particularly when such provisions are placed in contracts of adhesion like the one signed by Mr.

E.

Mr. Dunlap also asserts that Paragraph 14 of the Friedman's purchase and financing agreement document, that requires consumers to resolve disputes "[i]n accordance with the Commercial Rules of the American Arbitration Association" and adds that "[a]ll arbitrators or mediators' fees shall be equally divided between the parties," places such a high financial barrier in the path of any consumers seeking to vindicate their rights that most if not all consumers would be effectively discouraged from ever making the attempt. Mr. Dunlap argues that these costs and fees make arbitration under any terms effectively inaccessible to Mr. Dunlap and similarly situated consumers, substantially impeding their ability to "effectively vindicate" their rights. Mr. Dunlap argues that if the proponent of a contract of adhesion could impose excessive arbitration costs, the proponent could effectively shield themselves from potential liability for their wrongdoing

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Dunlap. "A functional analysis of the West Virginia cases which do not favor arbitration demonstrates that this Court would not countenance an arbitration provision by which the parties agree that all disputes will be arbitrated by a panel chosen exclusively by one of the parties." *Bd of Ed. v. W. Harley Miller, Inc.*, 160 W.Va. 473, 479, 236 S.E.2d 439, 443 (1977). "The right to appoint one's own arbitrator . . . is the essence of tripartite arbitration." *Anderson v. Nichols*, 178 W.Va. 284, 290 359 S.E.2d 117, ____ (1987). We have held that an impermissible structural unfairness in a tribunal, be it judicial or arbitral, would be presumed where the decision-maker is designated by one of the parties to a dispute and where the person making the decisions is compensated on a fee-per-case basis. *See State ex rel Shrewsbury v. Poteet*, 157 W.Va. 540, 202 S.E.2d 628 (1974) (justice of the peace system, criminal cases); *State ex rel. Reece v. Gies*, 156 W.Va. 729, 198 S.E. 211 (1973) (justice of the peace system, civil cases); *Haas v. County of San Bernadino*, 27 Cal. 4th 1017, 119 Cal. Rptr. 2d 341, 45 P.3d 280 (2002) (administrative law judges). Consieration of this neutrality principle has been recognized by courts addressing the enforceability of an arbitration requirement. *See, e.g., Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999); *Toppings v. Meritech Mortg. Services*, 140 F.Supp.2d 683 (S.D.W.Va. 2001); *Graham v. Scissor-Tail*, 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P.2d 165 (Cal. 1981)

in connection with the subject of the contract—and this would constitute an abuse of the arbitration process.

The Supreme Court has recognized that "[t]he existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her . . . rights in the arbitral forum." *Green Tree Financial Corp. v. Randolph,* 531 U.S. 79, 90, 121 S.Ct. 513, 522, ___ L.Ed.2d ___, ___ (2000). "It is not only the costs imposed on the claimant but the *risk* that the claimant may have to bear substantial costs that deters the exercise of the constitutional right of due process." *Armendariz v. Foundation Health Psychcare Services, Inc.,* 24 Cal. 4th 83, 110, 6 P.3d 669, 687 (2000) (holding that when an employer imposes mandatory arbitration as a condition of employment, the arbitration process generally cannot impose expenses on an employee that the employee would not have to bear in court) (emphasis in original).

The specter of high arbitration costs being used to prevent claimants from having reasonable access to justice was discussed in *Shankle v. B-G Maintenance Management of Colorado,* 163 F.3d 1230, 1234-35 (10th Cir. 1999):

> In order to invoke the procedure mandated by his employer, however, Mr. Shankle had to pay for one-half of the arbitrator's fees. Assuming Mr. Shankle's arbitration would have lasted an average length of time, he would have had to pay an arbitrator between $1,875 and $5,000 to resolve his claims. Mr. Shankle could not afford such a fee, and it is unlikely other similarly situated employees could either. The Agreement thus placed Mr. Shankle between the proverbial rock and hard place—it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum.[citation omitted.]

In refusing to compel arbitration because of high costs imposed by an arbitration clause, the U.S. Court of Appeals for the D.C. Circuit held that ". . . it is unacceptable to require

Cole to pay arbitrators' fees, because such fees are unlike anything that he would have to pay to pursue his statutory claims in court." *Cole v. Burns Intern. Security Services,* 105 F.3d 1465, 1484 (D.C. Cir. 1997). Following *Cole,* the Eleventh Circuit found an arbitration clause unenforceable based on cost provisions similar to the ones in this case, requiring statutory claimants to pay AAA a $2,000 filing, plus a share of the arbitrator's fees. "[C]osts of this magnitude [are] a legitimate basis for a conclusion that the clause does not comport with statutory policy [enabling claimants to vindicate their statutory rights]." *Paladino v. Avnet Computer Technologies, Inc.,* 134 F.3d 1054, 1062 (11th Cir. 1998) (Cox, J., concurring for majority of court).[13] Additionally, the

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[13] Similarly, the California Supreme Court, in striking an arbitration clause which imposed high costs on statutory claims, emphasized:

> . . . we are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case. Under *Gilmer,* arbitration is supposed to be a reasonable substitute for a judicial forum. Therefore, it would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.

Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83, 108, 6 P.3d 669, 685 (2000). The Friedman's contract calls for resolution of disputes in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Mr. Dunlap asserts in his Petition that the AAA imposes substantial filing fees, and that its arbitrators charge hundreds of dollars an hour for both in-hearing time and for "study" time. The fees, he asserts, include a $500 minimum, non-refundable administrative fee; a $150 daily hearing fee; a $150 daily room rental fee; a $100 to $350 hourly arbitrator fee, for in-hearing as well as "study" time; processing fees, reporting service fees, and possible postponement fees; for an asserted total cost of arbitration approaching $1,000 per day. The U.S. District Court for the Western District of Virginia recently denied a motion to compel arbitration before the AAA, having found that the plaintiff would have to "pay an initial filing fee of $1250 to initiate her claim and

a $750 case fee shortly thereafter. Camacho could not recover those fees, unless she ultimately prevailed on her claim." *Camacho v. Holiday Homes, Inc.*, 167 F.Supp.2d 892, 897 (W.D.Va. 2001). And the federal district court for the Northern District of Illinois recently found that AAA arbitration costs were a basis for denying a motion to compel arbitration, noting that:

> Phillips offers evidence from the AAA that she will be forced to pay upwards of $4,000 simply to file her claim. . . . Furthermore, the initial filing fee is far from the only cost involved in the arbitration. The AAA's Commercial Rules provide that the arbitrator's fees (which range from $750 to $5,000 per day, with an average of $1,800 per day in the Chicago area), travel expenses, rental of a hearing room, and other costs are borne equally by the parties, absent some agreement between the parties.

Phillips v. Associates Home Equity Services, 179 F.Supp.2d 840, 846 (N.D. Ill. 2001). In *Ball v. SFX Broadcasting*, 165 F.Supp.2d 230, 240 (N.D.N.Y. 2001), the Court stated:

[plaintiff] Christopher has submitted an affidavit in support of her opposition detailing the various costs which she can reasonably be expected to incur if she is compelled to submit her claims to arbitration. These include a $1,000 per day arbitrator's fee, a $500 counterclaim fee, $150 per day hearing fees, and $150 per day postponement fees. [citations omitted].

Cf. also Mendez v. Palm Harbor Homes, Inc., 45 P.3d 594 (Wash. 2002) (holding that an arbitration agreement may be stricken when the party opposing arbitration reasonably shows in law or equity that prohibitive costs are likely to render the arbitral forum inaccessible). Friedman's *et al.* points out that AAA "*may*, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees." Mr. Dunlap replies that "deferment or reduction of fees from AAA" applies solely to AAA administrative fees and does not extend to any of the other arbitration costs; that "deferral" means that Mr. Dunlap would have to pay the AAA later (as opposed to up front), but pay nonetheless; and that "may" connotes a lack of certainty, which in turn is compounded by the silence as to what constitutes "extreme hardship" in the eyes of AAA. Mr. Dunlap argues that AAA administrative fees, which themselves may be prohibitive when compared to the costs of the court system in court, are but a small portion of the financial burden that arbitration would impose on him. Friedman's *et al.* argue that AAA arbitrators "will customarily" hear the first day of arbitration for no additional fee, and asserts that "it is almost

burden of showing the costs that would be imposed by an arbitral forum falls upon the party challenging the forum.

Based on the principles enunciated in the foregoing cases, we hold that provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable. In any challenge to such a provision, the responsibility of showing the costs likely to be imposed by the application of such a provision is upon the party challenging the provision; the issue of whether the costs would impose an unconscionably impermissible burden or deterrent is for the court.[14]

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a certainty that the appointed arbitrator will serve without compensation." Mr. Dunlap responds that this "custom" is not required by AAA's rules and provides no relief to claimants whose claims will go beyond the first day; and that this "custom" does not extend to the preparation time which an arbitrator must put in prior to beginning the first day of hearing. In the *Camacho* decision, the court had the following to say about AAA deferral or reduction of fees:

> Though Camacho may apply for fee deferral or reduction due to "extreme hardship," the parties stipulate that waiver of fees is extremely rare in practice. The AAA does not provide formal standards for granting hardship, and its accounting department actually determines who is afforded "extreme hardship" status.

167 F.Supp.2d at 897. We cannot see how Mr. Dunlap's evidence regarding company-wide wrongdoing could be heard in a day in any forum; it appears that Friedman's *et al.*'s premise is that an arbitrator could not hear evidence about company-wide misconduct.

[14] Thus provisions in an adhesion contract that required a party to deposit an unreasonably high bond before returning an item for warranty repairs, or to pay travel expenses for the other party's witnesses if a case is filed in

Applying the foregoing to the instant case, Friedman's *et al.* are correct that Mr. Dunlap's contentions as to the cost of arbitration to Mr. Dunlap are at best speculative and not well-supported in the record. Certainly the circuit court made no determination about the likely costs of arbitration. Consequently Mr. Dunlap's "excessive costs" argument for reversal of the circuit court's order regarding arbitration is not persuasive.[15]

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court, would be subject to the same analysis.

[15] Mr. Dunlap also argues that his opportunity to obtain an award of attorney fees would be impaired in arbitration, as opposed to in circuit court, where a statute provides for their award in Consumer Protection Act cases, *W.Va.Code*, 46A-5-104 [1994]. Our statutes and common law provide in some cases for the award of attorney fees to encourage the "private attorney general" enforcement of laws that protect the general welfare; and we have an established body of law on attorney fee awards. *See, e.g.*, Syllabus Point 4, *Bowling v. Ansted Chrysler Plymouth-Dodge*, 188 W.Va. 468, 425 S.E.2d 144 (1992) (consumer fraud); Friedman's *et al.* say that attorney fees are as awardable in arbitration as they are in circuit court. Given our resolution of the other issues in the instant case, we need not address Mr. Dunlap's claim regarding attorney's fees. We do observe that, entirely independent of the arbitration issue, a provision in a contract of adhesion that would operate to restrict the availability of an award of attorney fees to less than that provided for in applicable law would, under our decision today, be presumptively unconscionable. For example, if Friedman's purchase and financing agreement had stated: "attorney fees may not be awarded to the Buyer in a dispute with the Seller in any forum," that would be a presumptively unconscionable provision, if the dispute were one where a prevailing party is entitled to attorney fees under state laws for the benefit and protection of the public.

F.

Based on all of the foregoing, we have concluded that as a matter of law that the provisions in Friedman's purchase and financing agreement document that severely limited Mr. Dunlap's rights and remedies were unconscionable.

Friedman's *et al.* argue that if this Court finds that any provisions of Friedman's purchase and financing agreement unconscionably limit Mr. Dunlap's rights and remedies, this Court should remand the case to the circuit court with instructions to compel Mr. Dunlap to go to arbitration on his claims against Friedman's *et al.* under altered terms and conditions in which Mr. Dunlap could fully and effectively vindicate his rights in the arbitral forum. Presumably this would mean that the circuit court would order arbitration where Mr. Dunlap could obtain class action relief, and where the full range of statutory and common-law damages, penalties, and other legal and equitable remedies could be imposed on Friedman's *et al.*[16]

A recent court opinion rejected a defendant's offer to trim the unconscionable provisions of an arbitration clause:

> In an effort to compel arbitration and dismiss the instant action against Drs. Porth and Kelly, United has expressed a willingness to waive the arbitration clauses' limitations that prevent an arbitrator from awarding extra contractual damages and punitive or exemplary damages. Principles of justice and fair play, however, lead to the conclusion that one party unilaterally cannot alter *post litem motam* terms of an agreement so that a case is dismissed .... The Court rejects United's attempted waiver.

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[16] Were we to follow Friedman's suggestion, however, the circuit court would also have to address on remand the issues of arbitral costs and attorney fees.

In re Managed Care Litigation, 132 F. Supp. 2d 989, 1001 (S.D. Fla. 2000) (footnote and citations omitted). Another recent decision rejected a drafting party's attempt to rewrite an unconscionable arbitration clause, stating:

> Flyer Printing points out that it offered to pay all the costs of arbitration notwithstanding the language of the agreement. Hill rejected this unilateral offer to amend the agreement, however, and we are not authorized to remake the parties' contract.

Flyer Printing Co. Inc. v. Hill, 805 So. 2d 829, 833 (Fla. App. 2001).

In *Armendariz, supra,* 6 P.3d at 697, the California Supreme Court stated:

> Moreover, whether an employer is willing, now that the employment relationship has ended, to allow the arbitration provision to be mutually applicable, or to encompass the full range of remedies, does not change the fact that the arbitration agreement as written is unconscionable and contrary to public policy. Such a willingness "can be seen, at most, as an offer to modify the contract; an offer that was never accepted. No existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it." [citations omitted].

In evaluating Friedman's *et al.*'s argument that we should order the circuit court to compel arbitration, but under "conscionable" standards, we must again recognize the nature of the contract that is at issue—and the substance of the use to which Friedman's *et al.* have sought to put arbitration in the context of that contract.

Friedman's *et al.* are not asking this court to re-write a business contract that was knowingly entered into by two sophisticated parties—where a court doing equity might seek to put the parties where they really intended to be, by correcting a provision in the contract that has become

unconscionable because of a mistake or changed circumstances.

Rather, Friedman's *et al.,* by tying substantively unconscionable exculpatory and limitation of liability provisions to an arbitration provision in a form contract of adhesion, has sought to unilaterally use (one could say "misuse") the honorable mechanism of arbitration—that has found a respected place in the commercial life of our nation—as a scheme or mechanism to shield itself from legal accountability for misconduct.

Under such circumstances, we think a court doing equity should not undertake to sanitize any aspect of the unconscionable contractual attempt.

Consequently, we conclude that the circuit court erred in refusing to exercise its ordinary jurisdiction over the claims made by Mr. Dunlap, and in instead requiring Mr. Dunlap to bring any disputes he has with Friedman's *et al.* to arbitration.

IV.
Conclusion

We conclude with a quotation from *Ting v. AT & T,* 182 F. Supp. 2d 902, 938-39 (N.D. Cal. 2002), which is applicable to the instant case:

> This lawsuit is not about arbitration[17] . . . [Under the guise of requiring arbitration, the company] was actually rewriting substantially the legal landscape on which its customers must contend . . . [the company] sought to shield itself from liability . . . by imposing Legal Remedies Provisions that eliminate class actions, sharply curtail damages in cases of misrepresentation, fraud, and other intentional torts, cloak the arbitration process with secrecy and place significant financial hurdles in the path of a potential litigant. It is not just that [the company] wants to litigate in the forum of its choice—arbitration; it is that [the company] wants to make it very difficult for anyone to effectively vindicate her rights, even in that forum. That is illegal and unconscionable[.]

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[17] We emphasize that the attempted avoidance of legally-required accountability for wrongdoing under the laws of West Virginia that Friedman's has attempted to accomplish with exculpatory arbitration-related provisions in a contract of adhesion in the instant case would be just as objectionable and unconscionable if that attempted avoidance arose from language that made no mention of arbitration. Also, we emphasize that our concern in the instant case is with the attempted prohibition or limitation of rights, remedies, and protections that are afforded for the benefit of the public by statutes and the common law; and we do not address the assertion, vindication, and enforcement of rights that arise purely from the contract itself. Finally, we note that Justice Neely, in *Bd. of Ed. v. Harley Miller, supra,* stated that arbitration clauses that were abusively included in contracts of adhesion, that were unconscionable, that were wholly inappropriate given the nature of the contract and could only have been intended to defeat just claims, or were oppressive under the circumstances, could not be held to have been truly "bargained for" and therefore should not be enforced. 160 W.Va. at 486, 236 S.E.2d at 443. This standard, applied to the facts of the instant case, also supports this Court's decision.

The requested writ of prohibition is granted and this case is remanded for further proceedings consistent with this opinion.[18]

Writ Granted

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[18] Mr. Dunlap also argues that American Bankers cannot compel Mr. Dunlap to go to arbitration with his claims against American Bankers, because they are neither a party to nor referred to in the purchase and financing agreement document. We need not reach this issue, but we observe that this Court recently stated:

Despite the recognized exception to the rule requiring express assent to require arbitration, there is equally "[p]ersuasive authority . . . that a . . . court is not required to compel arbitration between parties who have not agreed to such arbitration."

State ex rel. United Asphalt Suppliers, Inc. v. Sanders, 511 S.E.2d 134, 138, 139, 204 W.Va. 23, 27-28 (1998).

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JAMES DUNLAP and STEPHANIE GIBSON,
on behalf of themselves and all others similarly situated,
Plaintiffs,
v.
FRIEDMAN'S INC., d/b/a Friedman's Jewelers,
a Delaware corporation, et al.,
Defendants.

CIVIL ACTION NO.: 00-C-1155

ORDER GRANTING DEFENDANTS' JOINT MOTION TO COMPEL ARBITRATION AND STAY ALL PROCEEDINGS REGARDING PLAINTIFF, JAMES DUNLAP

Pending before the Court is "Defendants' Joint Motion to Compel Arbitration and Dismiss or Stay All Proceedings Regarding Plaintiff, James Dunlap." Having reviewed the Defendants' memorandum in support of their motion, the Plaintiff's memorandum in opposition thereto, the Defendants' reply memorandum, Plaintiff's surreply, the supplemental filings by the parties, and the cited case law authorities and having heard the argument of counsel at a hearing on the motion, the Court is of the opinion to grant Defendants' joint motion. The Court finds:

1. While the arbitration clause reserved to Defendant Friedman's the right of repossession under the default clause in paragraph 4, it is distinguished from the clause found unconscionable in *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854, 204 W. Va. 229 (1998).

2. The mere reserving of the right of repossession does not render the arbitration clause unconscionable or unenforceable; this proposition is supported by federal case law. *See, e.g.,*

Mobil Oil Corp. v. Earhart Petroleum, Inc., 2000 U.S. App. LEXIS 8674, *13-*14 (4th Cir. May 3, 2000); *Thompson v. Illinois Title Loans, Inc.*, 2000 U.S. Dist. LEXIS 232, *7-*9 (N.D. Ill. Jan. 11, 2000); *Stourt v. Byrider*, 50 F. Supp.2d 733, 737-38 (N.D. Ohio 1999); *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007, 1012-15 (M.D. Ala. 1997); *Kelly v. UHC Management Co.*, 967 F. Supp. 1240 (N.D. Ala. 1997) (*citing* Restatement (Second) of Contracts § 79 (1981)).

3. The terms of the arbitration clause are not unconscionable in that while there is generally always some disparity in bargaining power when a consumer enters into an agreement with the retailer, the parties' positions in the instant matter are not so grossly unequal as to render the arbitration clause unenforceable.

4. The Court is not persuaded by Plaintiff's arguments that the arbitration clause is unfair or invalid.

5. The arguments of judicial economy favor staying this litigation, pending arbitration.

Accordingly, it is **ORDERED** that the litigation in this civil action involving Plaintiff James Dunlap be, and it is hereby, stayed pending arbitration. The parties are further directed to request the arbitrator to provide the Court with a copy of the arbitration decision upon conclusion.

The Court notes Plaintiff's objections and exceptions to this ruling.

The Clerk of the Court is directed to send certified copies of this Order to counsel of record.

ENTERED April 19, 2001

/s/
IRENE C. BERGER
Judge, Kanawha County Circuit Court

Friedman's
The Value Leader®

RETAIL INSTALLMENT CONTRACT
No. -

BUYER ADDRESS: Cross Lanes, WV | SOLD BY | PHONE NO. 5593-1-06201 | CONTRACT DATE
James E Dunlap | ACCT. NO. | CREDIT APPROVAL | NEW SALE | ADD ON SALE | RE-OPEN SALE | LAYAWAY

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	Amount Financed	Total of Payments	Total Sale Price
The cost of your credit as a yearly rate	The dollar amount your credit will cost you	The amount of credit provided to you or on your behalf	The amount you will have paid after you have made all payments as scheduled	The total cost of your purchase on credit, including your down payment of:
%	WV 25177 $ 23.49 1.41	55931900618 45 $	JT $	XX $

NUMBER OF PAYMENTS	AMOUNT OF PAYMENTS	WHEN PAYMENTS ARE DUE
18.00	24.90 440.39	BEGINNING [illegible] AND CONTINUING ON THE SAME DAY OF EACH FOLLOWING MONTH, OR IF NO SUCH DATE EXISTS, ON THE LAST DAY OF THE MONTH

SECURITY: You are giving a security interest in: 78.00 09/20/99
☐ the goods being purchased ☐ the goods purchased under previous contract(s) with seller. 78.20

You are also giving a security interest in related insurance proceeds and in the refunds of certain insurance premiums.

LATE CHARGE: If any payment is not paid after 14 days after its due date, you will be charged a late fee of $10.00 or 5% whichever is less. Such charge will only be collected once on any payment.

PREPAYMENT: If you pay off early, you may be entitled to a refund of part of the finance charge.

The Buyer and the Co-Signer, if any, agree to pay, jointly and severally, to Friedman's Jewelers (the "Seller") the Total of Payments pursuant to the payment schedule shown above, and to pay late charges, overdue finance charges, and any and all other charges due pursuant to the terms of this installment credit agreement (the "Agreement") and permitted under Federal Law and the laws of the state in which this transaction is consummated (the "Governing Law"). The Buyer acknowledges purchasing the goods and services listed below from Seller.

QUANTITY	STOCK NUMBER	DESCRIPTION	LIST PRICE	TRADE-IN VALUE	AMOUNT
1	416453	10K BLUE STAR DIA RG STARBLO	-199.00		-139.30
1	551548	10KT GENTS NUGGET RING	225.00		157.50
		[illegible]			
		TOTALS			

STATEMENT OF INSURANCE (WEST VIRGINIA)

Credit Life insurance will pay the outstanding balance of Buyer's indebtedness in the event of the death of the insured; credit disability insurance will pay installments payable while the insured is disabled; property insurance will pay the replacement cost of goods purchased hereunder in the event of their loss. Neither credit life, nor credit disability, nor property insurance is required. If such insurance is purchased, you may obtain such insurance from anyone you want that is acceptable to Seller. No insurance coverage is provided unless its box is checked, charged, and therefore noted below and under its at right. All insurance is for the term of the loan. Said insurance will be procured by Seller and will expire on the due date of final installment.

I DESIRE:	Coverage	Premium
___	Credit Life Insurance	$ ____
XX		1.48
___	Credit Disability Insurance	$ ____
		0.00
___	Property Insurance	$ ____
XX		6.96

Application of Buyer

You are applying for the insurance marked above. Your signature below means that you agree that:
1. You are not eligible to enroll for other credit life or credit disability insurance if you have reached your 66th birthday.
2. You are eligible for disability insurance only if you are working for wages or profit 30 hours a week or more on the coverage Effective Date.
3. Your co-borrower is not eligible for life nor disability insurance.
4. You want to purchase the above checked insurances and you received a copy of the insurance policy.

[signature] [illegible] [illegible]
Date | Primary Buyer's Signature | Date of Birth

ITEMIZATION OF THE AMOUNT FINANCED 1.20

1. CASH PRICE AND TAX		
a. MERCHANDISE PRICE	$ ____	
b. LIMITED WARRANTY(IES)	$ ____	
c. SERVICES	$ 18.20	
d. TOTAL MERCHANDISE AND SERVICES	0.00	$ ____
e. SALES TAX	$ 0.00	
f. TOTAL CASH PRICE	1.09	$ 18.20
2. AMOUNT PAID TO OTHERS ON YOUR BEHALF		
a. Insurance Premiums	$ ____	19.29
b. Documentary Stamp Tax (if applicable)	$ ____	
c. TOTAL AMOUNT PAID TO OTHERS ON YOUR BEHALF	8.44 0.00	$ ____
3. SUBTOTAL (1f + 2c)		$ 8.44
4. DOWNPAYMENT AND TRADE-IN		
a. Cash Downpayment	$ ____	27.73
b. Trade-In Value	$ ____	
c. Sales Tax Credit (if applicable)	$ 0.00	
d. TOTAL DOWNPAYMENT AND TRADE-IN (4a+4b+4c)	0.00 0.00	$ ____
5. UNPAID BALANCE OF THIS PURCHASE (3 - 4d)		$ 0.00
6. EXISTING ACCOUNT BALANCE		
a. Outstanding Balance to be Consolidated	$ ____	27.73
b. Rebate of Unearned Finance Charge	$ ____	
c. Rebate of Unearned Insurance Premiums	$ 444.88	
d. NET ACCOUNT BALANCE TO BE CONSOLIDATED (6a - 6b - 6c)	22.78 8.07	$ ____
7. AMOUNT FINANCED (5 + 6d)	1.37	$ 440.39

NOTICE TO BUYER

DO NOT SIGN THIS CONTRACT BEFORE YOU HAVE READ IT OR IF IT CONTAINS ANY BLANK SPACES. YOU ARE ENTITLED TO AN EXACT COPY OF THE CONTRACT THAT YOU SIGN. YOU HAVE THE RIGHT TO PAY IN ADVANCE THE UNPAID BALANCE OF THIS CONTRACT AT ANY TIME WITHOUT PENALTY AND, UNDER CERTAIN CONDITIONS, OBTAIN A PARTIAL REFUND OF THE FINANCE CHARGE.

BUYER HEREBY ACKNOWLEDGES DELIVERY AND RECEIPT OF A COMPLETED COPY OF THIS AGREEMENT, INCLUDING THE DISCLOSURES REQUIRED BY THE FEDERAL CONSUMER CREDIT PROTECTION ACT INCLUDED HEREIN.

WITNESS MY HAND AND SEAL:

BUYER AGREES TO THE TERMS AND CONDITIONS ON BOTH SIDES OF THE AGREEMENT.

BUYER'S SIGNATURE [signature] (L.S.) DATE: _____

CO-SIGNER'S SIGNATURE _____ (L.S.) DATE: _____

NOTICE: SEE OTHER SIDE FOR ADDITIONAL TERMS WHICH ARE PART OF THIS AGREEMENT. PARAGRAPH 14 ON THE REVERSE HEREOF INCLUDES AN ALTERNATE DISPUTE RESOLUTION PROCEDURE, INCLUDING A REQUIREMENT FOR ARBITRATION OR MEDIATION.

THIS CHATTEL PAPER AND THE OBLIGATIONS OWING TO AND RIGHTS OF FRIEDMAN'S INC. HEREUNDER ARE SUBJECT TO PARI PASSU SECURITY INTERESTS IN FAVOR OF NATIONSBANK OF GEORGIA, N.A., FIRST UNION NATIONAL BANK OF GEORGIA AND ABN AMRO BANK N.V.

CUSTOMER

BEST AVAILABLE COPY

ADDITIONAL TERMS OF PURCHASE

1. PAYMENTS. Payments should be brought to any Friedman's Jewelers store location or mailed to Friedman's Jewelers at the address shown at the top of the front page of this Agreement. All checks should be made payable to Friedman's Jewelers.

2. AMOUNT PAYABLE: The Amount Financed plus all accrued finance charges, late charges, minimum finance charges, and other charges shall be payable notwithstanding the destruction, damage, or loss of all or any part of the property purchased pursuant to this Agreement.

3. PREPAYMENT. Upon prepayment in full or satisfaction of the indebtedness evidenced hereby prior to maturity, the Buyer may be entitled to a rebate of the unearned portion of the finance charge and any unearned insurance premium computed in accordance with federal law and the laws of the state in which the transaction is consummated ("Applicable Law"). If the term of this Agreement is 61 months or less, Seller will determine the refund using the Rule of 78ths Method. If the term of this Agreement is greater than 61 months, Seller will determine the refund according to the Actuarial Method. Where the amount of such rebate is less than $1.00, no refund will be made.

4. DEFAULT: If any payment is not made when due, or if the Buyer or the Co-Signer, if any, dies or becomes insolvent, or if a bankruptcy or similar proceeding is commenced by or against the Buyer or Co-Signor, or if any attachment or garnishment proceedings are initiated against the Buyer or the Co-Signer, the Seller may, at its option and without notice, declare the entire unpaid balance immediately due and payable, and, to the extent permitted by Applicable Law, repossess the merchandise which has not been paid for in full. In the event of acceleration the Buyer shall be entitled to a rebate of unearned finance charges according to the Applicable Law. The Buyer and the Co-Signer, if any, agree to pay, jointly and severally, all costs incurred by the Seller in collecting the indebtedness under this Agreement, including, without limitation, reasonable attorneys' fees and court costs in an amount not to exceed 15% of the unpaid debt.

5. SECURITY INTEREST/APPLICATION OF PAYMENTS: The Buyer acknowledges and agrees that the Seller will retain a security interest pursuant to the Uniform Commercial Code (as adopted in the state in which the transaction is consummated) in the goods financed or refinanced pursuant to the terms of this Agreement, related insurance proceeds, and in the refunds of certain insurance premiums until the purchase price of each item is paid in full. Payments shall be applied to accrued late charges and other charges first, then to accrued interest, and thereafter to the purchase price of the items financed in the order in which the items were purchased, except as otherwise provided by Applicable Law. Acceptance by Seller of a late payment does not excuse further late payments. Failure of Seller to collect any charge shall not be a waiver of Seller's right to collect charges thereafter. The security interest in a particular item shall terminate as that portion of the aggregate purchase price attributable to the particular items paid.

6. NOTICES: Any notice the Seller sends to you will be deemed effective when it is personally delivered to you or mailed, postage paid, to the last address the Seller has for you in its records. Any notice sent to the Seller will be deemed effective when it is received by the Seller at the address shown at the top of the front page of this Agreement.

7. PRIOR OUTSTANDING BALANCES: If the Buyer currently has an outstanding balance under another installment credit agreement with the Seller, the Buyer and the Co-Signer, if any, acknowledge and agree that upon signing this Agreement the outstanding balance (less any rebates of unearned finance and unearned insurance charges calculated pursuant to Applicable Law) under such installment credit agreement will be financed subject to the terms of this Agreement. The Buyer and the Co-Signer, if any, agree that the outstanding balance under such installment credit agreement will be treated as if it had been voluntarily prepaid in full and then re-borrowed pursuant to the terms of this Agreement.

8. MAXIMUM FINANCE CHARGES. In no event shall the amount of finance charges due or payable hereunder exceed the maximum rate allowed by Applicable Law. In the event any such payment is inadvertently paid by the Buyer or Co-Signer, or inadvertently received by the Seller, then such excess sum shall be applied to the balance outstanding under this Agreement, or, if so requested, returned to the Buyer or the Co-Signer (as applicable).

9. ASSIGNMENT: This agreement may be assigned by the Seller without prior notice to the Buyer or Co-Signer.

10. CHOICE OF LAW: This Agreement shall be construed in conformity with Applicable Law and this Agreement shall not be deemed to limit any of the rights of the parties under such laws unless otherwise expressly provided herein.

11. REMEDIES: The Seller shall have all the remedies of a secured party under the applicable Uniform Commercial Code.

12. TIME OF THE ESSENCE: Time and each of the terms and conditions herein stated, is expressly declared to be of the essence. Neither the Seller's delay in exercising, nor its failure to exercise any of its remedies shall constitute a waiver of any provisions of this Agreement.

13. SEVERABILITY: If any part of this Agreement is invalid under Applicable Law, such part of this Agreement shall be deemed amended to conform thereto and shall not invalidate any other part of this Agreement.

14. ALTERNATE DISPUTE RESOLUTION: All disputes, controversies or claims of any kind or nature between Buyer and Seller, arising out of or in connection with the sale of goods financed or refinanced pursuant to the terms of this Agreement, or any earlier Agreement between Seller and Buyer ("earlier Agreement") or with respect to negotiation of, inducement to enter into, construction of, performance of, enforcement of, or breach of, effort to collect the debt evidenced by, the applicability of the arbitration clause in, or the validity of this Agreement or any earlier agreement (except as specifically set forth in this paragraph 14 below), shall be resolved by arbitration in the state in which this Agreement is entered into, at a location reasonably near the place where you signed this Agreement, in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The parties acknowledge and agree that the goods financed or refinanced in this Agreement and the transactions evidenced by this Agreement are in "commerce" as defined in the Federal Arbitration Act, 9 USC § 1-16. In the event, for any reason, the provisions of this Agreement requiring arbitration are unenforceable, the parties agree to initiate mediation with the mediator selected by agreement of the parties; provided, however, if the parties cannot agree on a mediator within thirty (30) days after request for mediation is made by one party, then either party may request the senior judge of the United States District Court for the district in which the dispute arises, to appoint a mediator. If, and only if, such mediation fails to resolve the dispute, may the parties thereafter proceed with the matter in an appropriate court. All arbitrators or mediators' fees shall be equally divided between the parties. Exception to arbitration and mediation: The Seller may exercise its right upon default by Buyer as set forth in the paragraph entitled "default" above, without resort to arbitration or mediation. Nothing in this paragraph shall be construed to prevent either party's use of bankruptcy or, repossession, replevin, judicial foreclosure, non judicial foreclosure or any other prejudgment or provisional remedy relating to any collateral, security or property interests for contractual debts now or hereafter and by either party to the other under this Agreement. No arbitrator may make an award of punitive damages.

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE BUYER COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE BUYER SHALL NOT EXCEED AMOUNTS PAID BY THE BUYER HEREUNDER.

UNITED STATES CODE
TITLE 9. ARBITRATION
CHAPTER 1—GENERAL PROVISIONS

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for

an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(2)

Supreme Court, U.S.
FILED

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No. 02-315

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

FRIEDMAN'S INC. D/B/A FRIEDMAN'S JEWELERS, AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, INC., AND AMERICAN BANKERS LIFE ASSURANCE COMPANY OF FLORIDA

Petitioners,

v.

STATE OF WEST VIRGINIA *EX REL* JAMES DUNLAP,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Notwithstanding the high-octane rhetoric in the petition for *certiorari* about how the decision below threatens an end to all arbitration in West Virginia, this case is not really about arbitration. If the decision below stands, Petitioners will still be able to hold their West Virginia customers to mandatory binding arbitration clauses if they so choose. The only limits imposed by the court below are that Petitioners may not (a) force customers to relinquish their right to seek substantive legal remedies, such as punitive damages awards; (b) take away from customers the right to seek class-wide relief through class action proceedings (whether in arbitration or in court); or (c) impose a one-sided arbitration system that gives Petitioners a choice of forum between court and arbitration for their claims against customers while forcing customers to go to arbitration for all of their claims against Petitioners.

None of these features is inherent or unique to arbitration; indeed, the vast majority of arbitration clauses commonly in use in the U.S. do not place limits on damages and apply equally to both parties. Other arbitration clauses also provide that consumers may pursue claims on a class action basis. As the opinion below makes clear, any of these provisions or features would have been unconscionable under generally applicable West Virginia law had they been contained in a contract that did not involve arbitration. Petitioners' position amounts to the following: even if West Virginia's general law of unconscionability would strike down such exculpatory and one-sided terms in a contract not involving arbitration, that law is overridden by the Federal Arbitration Act ("FAA") so long as such provisions are included in a section of a contract that *also* includes an arbitration provision. Nothing in the FAA permits parties to launder otherwise illegal contract terms and make them legal merely by sticking them under the heading of "arbitration," however, and this Court has never so held.

The opinion below is merely a determination of generally applicable state contract law by West Virginia's high court that comports with principles set forth in a large number of that court's decisions in cases not involving arbitration. None of the decisions from other jurisdictions cited by Petitioners involves determinations of West Virginia's state law of exculpatory clauses, and thus none of those decisions conflict with the decision below. In addition, most of the cases cited by Petitioners are inapposite. These cases relate to punitive damages involve decisions affirming awards of punitive damages, and most of the decisions cited by Petitioners relating to class actions involve interpretations of federal statutes that are entirely unrelated to this case.

The opinion below is also entirely consistent with this Court's decisions. This Court has consistently instructed that arbitration clauses need not be enforced if they violate generally applicable principles of state contract law, and do not allow claimants to effectively vindicate their substantive rights. That is what happened in this case. Accordingly, the question presented in the Petition for Certiorari does not warrant a grant of this Court's discretionary review.

First, this Court has held that the FAA permits states to apply generally applicable contract defenses to arbitration clauses. *See, e.g., Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681 (1996). Following *Doctor's Associates*, the court below applied such a body of state law to invalidate a limitation on liability. Friedman's portrayal of that decision as an attack by the state court on the Federal Arbitration Act ("FAA") is baseless. Instead, this Petition raises the question of whether the FAA overrides West Virginia's generally applicable contract law relating to exculpatory clauses. The court below held that West Virginia law forbids parties from entering into

any contract that denies parties the substantive right to recover punitive damages under West Virginia law. This prohibition on broad exculpatory clauses claims is a rule of law that West Virginia courts apply without respect to the forum in which a case is heard.

This Court has also consistently instructed that arbitration clauses are to be enforced only to the extent that they permit claimants to effectively vindicate their substantive rights. *See EEOC v. Waffle House Corp.*, 534 U.S. 279, 295 n. 10 (2002). Because the challenged provisions in Friedman's contract would not permit its customers to effectively vindicate their substantive rights under West Virginia law, the state high court's decision to bar such a waiver is entirely consistent with this Court's opinions.

STATEMENT OF THE CASE

A. The Underlying Transaction Between the Parties

Friedman's, Inc. ("Friedman's") is a jewelry store chain doing business in West Virginia. Respondent James Dunlap, a customer who purchased jewelry through an installment sales agreement, alleges that Friedman's has "been carrying out a systematic, deceptive, and illegal 'loan packing' scheme, with the purpose and effect of surreptitiously adding unrequested insurance charges to the cost of consumers' purchases from Friedman's." Petitioners' Appendix ("Pet. App.") 3a.

Dunlap alleged that Friedman's deliberately ordered its employees to conceal and lie about these added insurance charges. Pet. App. 4a. Dunlap supported these allegations with several sworn affidavits from former Friedman's employees who testified that Friedman's directed its employees not to

disclose these charges, *see* Pet. App. 4a-61, and to lie about them if asked. *E.g.*, Pet. App. 5a ("When I questioned what should we do if a customer questions the insurance, I was told that we should tell the customer that it was a computer error.")

The State Attorney General investigated the allegations and found that they were true, reporting that "[a] successful undercover sting operation conducted by this office verified illicit wrongdoing by Friedman's. The Division has further determined that neither Friedman's nor its employees have a license to sell insurance in West Virginia." West Virginia Attorney General, Annual Reports: 1999, *available at* www.state.wv.us/wvag/annualreports/1999/an99_litigation_Friedman.htmlg (last visited on 9/30/2002).

B. Petitioners' Mandatory Arbitration Clause

As part of its standard form installment sales contract with Dunlap and other customers, Friedman's included a mandatory arbitration clause. The arbitration provision begins by stating that it applies to all disputes arising out of the transaction between the parties:

> All disputes, controversies or claims of any kind or nature between Buyer and Seller, arising out of or in connection with the sale of goods financed or refinanced pursuant to the terms of this Agreement . . . or with respect to negotiation of, inducement to enter into, construction of, performance of, enforcement of, or breach of, effort to collect the debt evidenced by, the applicability of the arbitration clause in, or the validity of this Agreement or any earlier agreement (except as specifically set forth in paragraph 14 below), shall be resolved by arbitration

. . . .

Pet. App. 10a.

More than halfway down the paragraph explaining the parties' duties relating to arbitration, Friedman's inserted an exception to this obligation for many of its own claims:

> The Seller may exercise its right upon default by Buyer as set forth in the paragraph entitled "default" above, without resort to arbitration or mediation. Nothing in this paragraph shall be construed to prevent either party's use of bankruptcy or repossession, replevin, judicial foreclosure, non judicial foreclosure or any other prejudgment or provisional remedy relating to any collateral, security or property interests, for contractual debts now or hereafter and by either party to the other under this Agreement. . . .

Id. The arbitration clause thus restricts the rights of Dunlap and other customers by requiring them to arbitrate any legal claim they could ever assert against Friedman's. At the same time, it enhances the rights of Friedman's itself by allowing the company to choose among court, arbitration, or self-help remedies in asserting repossession and other property-based claims against its customers.

The arbitration clause concludes by imposing a limitation on the substantive remedies that are available to parties who must assert their claims through arbitration, stating that "[n]o arbitrator may make an award of punitive damages." *Id.* The arbitration clause thus limits the relief that is available to customers on all their claims while imposing no comparable

limitations on the claims Friedman's may bring in court. Similarly, the contract provides that "recovery hereunder by the buyer shall not exceed amounts paid by the buyer hereunder."

C. The State Court Proceedings

In the trial court, Dunlap opposed Petitioners' motion to compel arbitration on the grounds (among others) that the clause prohibited class actions, prohibited punitive damages, and was one-sided. In a brief two-page opinion, the trial court held that it was "not persuaded by Plaintiff's arguments that the arbitration clause is unfair or invalid." Pet. App. 44a.

On appeal to the West Virginia Supreme Court of Appeals, that court began with an analysis of the state's common law of unconscionability, Pet. App. 12a-13a, and then supplemented that analysis with an analysis of the provisions of the West Virginia Consumer Credit and Protection Act relating to unconscionable contract provisions. Pet. App. 13a-14a. The Court then analyzed West Virginia law with respect to contracts of adhesion, Pet. App. 14a-19a, noting that the principle that provisions in adhesive contracts that are outside of the reasonable expectations of the parties are unenforceable is "a provision of equity applicable to all contracts generally. . . ."

The Court then traced how these principles are applied to exculpatory provisions in contracts of adhesion. It reviewed a number of its own prior cases, none of which involved arbitration clauses, Pet. App. 19a-20a, establishing that "exculpatory provisions in contracts of adhesion are given close scrutiny, with respect to both their construction and their potential for unconscionability, particularly where rights, remedies and protections that exist for the public benefit are involved." Pet. App. 19a. The Court then explained that this

principal has been "reinforced by the public policy of this State, as enacted by the Legislature." Pet. App. 20a.

The Court next addressed Dunlap's argument that he had not knowingly, voluntarily and intelligently waived his right to a jury trial. It held that "we will for purposes of our decision give no weight to Mr. Dunlap's state constitutional rights to a jury trial in the public court system." Pet. App. 25a.

The Court then held that the provision in Friedman's arbitration clause prohibiting punitive damages was unconscionable, citing to one of its own prior cases (not involving arbitration) barring an insurance company from employing a similar contract provision to insulate itself from bad faith claims. Pet. App. 26a (citing *Smithson v. U.S. Fidelity & Guar. Co.*, 411 S.E.2d 850, 857 (W.Va. 1991)).

The Court then held that Friedman's arbitration clause was unconscionable, because by foreclosing class actions, it would prevent Dunlap from effectively vindicating his substantive rights. "In Mr. Dunlap's case, the total of $8.46 in insurance charges that Friedman's added to his purchase price by Friedman's is precisely the sort of small-dollar/high volume (alleged) illegality that class action claims and remedies are effective at addressing." Pet. App. 27a.

The Court then rejected Petitioners' claims that the FAA preempted its holdings, noting that otherwise unconscionable and unenforceable contract provisions are not magically made legal "merely because the prohibiting or limiting provisions are part of or tied to provisions in the contract relating to arbitration." Pet. App. 31a.

In a footnote, the Court also held that the one-sided nature of the clause reflected that it "lacks even-handedness," and provided "additional and independently adequate grounds for our holding herein." Pet. App. 31a at n.12.

The Court then rejected Petitioners' request that it re-write the arbitration clause to strike the illegal provisions, noting that it was not authorized "to remake the parties' contract." Pet. App. 39a (citation omitted).

Finally, the Court clarified that its holding was not based on anything to do with arbitration, but was instead based on generally applicable law that would apply any time a contract banned punitive damages or class actions:

> We emphasize that the attempted avoidance of legally-required accountability for wrongdoing under the laws of West Virginia that Friedman's has attempted to accomplish with exculpatory arbitration-related provisions in a contract of adhesion in the instant case would be just as objectionable and unconscionable if that attempted avoidance arose from language that made no mention of arbitration.

Pet. App. 41a.

D. The Federal Court Proceedings

At the same time that it petitioned the state trial court to compel arbitration, Petitioners also decided to seek a separate adjudication of the case in federal court. The U.S. District Court dismissed Petitioners' Petition to Compel Arbitration, and that dismissal was affirmed by the U.S. Court of Appeals for the Fourth Circuit. *See Dunlap v. Friedman's*, 290 F.3d 191

(4th Cir. 2002). That Court also denied without comment Petitioners' requests for rehearing *en banc*.

ARGUMENT

I. The Decision Below Invalidating a Prohibition on Punitive Damages Does Not Justify a Grant of *Certiorari*.

A. The Decision Below Does Not Deepen Or Create a Split of Authority

The decision below is an application of generally applicable West Virginia state contract law involving contract provisions purporting to strip individuals of their substantive rights. Given that the West Virginia Supreme Court is the final authority as to matters of West Virginia contract law, there can be no split of authority on this point. In addition, each of the cases cited by Petitioners is readily distinguished from this one.

As set forth in the Statement of Facts, the West Virginia Supreme Court's opinion in this case is rooted in the generally applicable state common law of unconscionability and the provisions of the West Virginia Consumer Credit and Protection Act. Pet. App. 13a-14a. Both of these sources of West Virginia law have placed sharp limits on the use of exculpatory clauses in contracts of adhesion of any sort. The holding of the court below that a "no punitive damages" provision in a contract of adhesion is unconscionable is not rooted in principles of arbitration law, but is instead consistent with an unbroken line of West Virginia cases not involving arbitration, all of which held that similar exculpatory clauses are unconscionable.

In *Art's Flower Shop v. The Chesapeake and Potomac Telephone Co. of West Virginia*, 413 S.E.2d 670 (W.Va. 1991), for example, the Court held that a contractual provision limiting the phone company's liability to twice the cost of an advertisement was unconscionable as applied to a plaintiff bringing claims for much larger compensatory and punitive damages. The Court's holding in this non-arbitration case that the terms were "unreasonably favorable" to the defendant, 413 S.E.2d at 675, is entirely consistent with its holding in the instant case. *See also Murphy v. North American River Runners*, 412 S.E.2d 504 (W.Va. 1991) (exculpatory clause releasing defendant from liability for reckless behavior is void as against public policy); *U.S. Life Credit Corp. v. Wilson*, 301 S.E.2d 169 (W.Va. 1982) (credit contract waiving a borrower's statutory right to sue if the creditor published his indebtedness was unconscionable); *Johnson v. Junior Pocahontas Coal Co.*, 234 S.E.2d 302 (W.Va. 1977) (exculpatory clause could not insulate strip mining contractor for liability for damages to a nearby property). None of those cases involves an arbitration clause, and each establishes that the decision below here is simply an application of generally applicable state law involving exculpatory clauses. To the extent that none of the cases cited by Petitioners involves West Virginia law on this topic, there can be no conflict between these authorities, except to the extent that the FAA might ever be construed to preempt generally applicable state contract law.

In addition, nearly every case cited by Petitioners as allegedly conflicting with the decision below involve challenges to arbitrators' decisions awarding punitive damages to a party – factual circumstances that are entirely unlike those involved here. This is true of *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704 (7th Cir. 1994); and *Raytheon Co. v.*

Automated Business Systems, Inc., 882 F.2d 6 (1st Cir. 1989). (Cited in the Petition at 12-13.) Thus, none of these cases involved a challenge to an arbitration clause prohibiting punitive damages, or a body of state law prohibiting exculpatory clauses relating to punitive damages.

These cases are distinguishable on numerous other grounds as well. For example, several of them purport to be applications of federal common law, rather than state law. *See, e.g., Raytheon*, 882 F.2d at 11 n.5; *Baravati*, 28 F.3d at 707. As this Court has subsequently directed, however, generally applicable state law (like the West Virginia law at issue here) should govern the issues of unconscionability or contract enforcement. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.")

In fact, several of the decisions cited by Friedman's actually *support* the reasoning of the Court below here. For example, the principal point of the *Raytheon* case – that arbitrators should be permitted to award punitive damages – is entirely consistent with the West Virginia Supreme Court's decision here:

> [P]unitive damages can serve as an effective deterrent to malicious or fraudulent conduct. Where such conduct could give rise to punitive damages if proved to a court there is no compelling reason to prohibit a party which proves the same conduct to a panel of arbitrators from recovering the same damages.

Raytheon, 882 F.2d at 12.

Friedman's claim that the cases listed above conflict with the opinion below in this case is also belied by other decisions from those jurisdictions. Each jurisdiction recognizes that arbitration clauses may not prevent parties from effectively vindicating substantive rights, and each recognizes that arbitration clauses are not enforceable where they conflict with generally applicable state law. The *Raytheon* case was decided by the First Circuit, for example, which has recognized that generally applicable state laws may lead to the invalidation of particular arbitration contracts. *See Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1121 (1st Cir. 1989). The Seventh Circuit, which decided *Baravati*, has also struck down arbitration clauses that run afoul of "ordinary state law contract principles." *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, 759 (7th Cir. 2001). The *Davis* case was decided by the Eleventh Circuit, which has struck down an arbitration clause that had "provisions that defeat the remedial purposes of the statute. . . ." *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054 (11th Cir. 1998). Taken in context, then, there is no conflict between the opinion below and the complete body of law on this subject in any of the jurisdictions relied upon by Petitioners. Each of those courts endorses the principles relied upon by the court below – that arbitration clauses do not permit the drafters of contracts to eliminate other parties' substantive rights to remedies, and that courts may refuse to enforce clauses that attempt to eliminate such rights under generally applicable rules of state contract law, without running afoul of the FAA.

In short, Petitioners have identified no authority that conflicts with the West Virginia Supreme Court's decision.

B. The Decision Below Does Not Conflict with the Decisions of this Court.

1. This Court Has Consistently Held That The FAA Does Not Alter Or Override Generally Applicable State Laws.

The West Virginia Supreme Court's holding that a court may not enforce a contractual provision prohibiting the award of punitive damages under state law is a routine application of the Federal Arbitration Act's express provisions and this Court's interpretations of the Act.

Section 2 of the FAA states that contractual arbitration clauses are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The West Virginia Supreme Court's decision below is consistent with this command of the FAA and this Court's opinions interpreting the Act to subject contractual arbitration provisions to the same rules of state law that apply to other contracts. In *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), this Court explained that Section 2 of the FAA places arbitration agreements on the same footing with other contracts so that "generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Id.* at 687. Likewise, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court highlighted Section 2's savings provision and warned that "'courts should remain attuned to well-supported claims that the agreement resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract.'" *Id.* at 33 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (internal quotation omitted)). In *Perry v.*

Thomas, 482 U.S. 483 (1987), the Court held that state law applies to arbitration clauses covered by the FAA "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally," while the Act only preempts those rules or principle of state law that "take [their] meaning precisely from the fact that a contract to arbitrate is at issue." *Id.* at 492 n.9 (emphasis in original). The Court has since held on numerous occasions that the FAA applies state contract law to determinations regarding the interpretation and enforceability of arbitration agreements.[1]

As Part C of the Statement of the Case and Part I-A of the argument, *supra*, make plain, West Virginia law forbidding parties from waiving liability for punitive damages is generally applicable to all contracts, whether they involve arbitration or not. Thus, the decision below is not directed against arbitration, but against a limitation on liability that is not uniquely related to arbitration. Petitioners suggest that the state court here was not applying generally applicable law, but was instead acting out of hostility to arbitration. But that is not so. This Petition, therefore, does not truly focus on arbitration, but instead on West Virginia general state contract law for exculpatory contracts.

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[1] *See, e.g.*, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 and 63 n.9 (1995) (applying Illinois and New York common law rule that ambiguous language should be construed against contract's drafter); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (applying Illinois and Pennsylvania law to determination of scope of arbitration clause).

2. This Court Has Consistently Stated That Arbitration Agreements Involve A Change In Forum But Not A Waiver Of Rights Under Substantive Laws.

This Court has stated that arbitration is acceptable as an alternative to litigation in court because it is simply a "different forum" – one with somewhat different and simplified rules, but nonetheless one in which the basic mechanisms for obtaining justice permit a party to "effectively vindicate" his or her rights. *See, e.g., EEOC v. Waffle House Corp.*, 534 U.S. 279, 295 n. 10 (2002); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). The Court has explained that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26. Petitioners' arbitration clause in this case falls far short of this baseline standard.

Numerous lower courts have interpreted this Court's direction in the same manner as the Court below, and directly contrary to the approach urged by Friedman's. In case after case, courts around the nation have applied this Court's jurisprudence to hold that arbitration provisions which limit a party's access to substantive legal remedies that are available in court may not be enforced. *See* Pet. App. 15a-17a (citing more than a dozen U.S. Courts of Appeal or U.S. district court opinions making this point). These cases – just like the West Virginia Supreme Court's decision below – merely followed this Court's guidance that arbitration is to be favored and allowed only where it is just another forum for adjudicating a party's statutory rights, not a means of denying those rights.

3. *Mastrobuono* Is Readily Distinguishable From This Case.

Friedman's claims that the decision below conflicts with this Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), pointing to language in that case where this Court spoke of enforcing arbitration clauses as written. *E.g.*, Pet. at 11-12. In fact, the decision below is perfectly consistent with *Mastrobuono.*

To begin with, Petitioners read far too much into *Mastrobuono.* As set forth above, this Court has recognized two major exceptions to the doctrine that arbitration clauses are to be enforced as written. *Mastrobuono* did not involve a challenge to a contract provision prohibiting arbitration clauses, but instead involved a challenge to an arbitrator's award of punitive damages to a party. Accordingly, the case did not involve a generally applicable body of state law, such as that applied by the court below here. In addition, the arbitration clause in *Mastrobuono* did not strip any party of his or her ability to effectively vindicate any substantive right under state law, as did the arbitration clause in this case.

Mastrobuono merely suggests that, as a general matter, parties may contract away any of their rights unless there is some affirmative body of substantive law that prohibits such a waiver. It was against this general backdrop, and not in the face of any particular positive state law to the contrary, that this Court suggested in *Mastrobuono* that parties are free to contract as they wish with respect to the right to recover punitive damages.

II. The Holding of the Court Below that a Contractual Ban on Class Actions Prevents Parties from Effectively Vindicating their Substantive Rights Does Not Justify a Grant of Certiorari.

A. The Decision Below Neither Creates Nor Deepens a Split of Authority.

The decision below relating to the effective ban on class actions is a straightforward application of West Virginia's long-standing and generally applicable state law relating to exculpatory clauses, and therefore is not in conflict with the cases cited by Petitioners. As the Court below made plain, a prohibition on class actions in a contract of adhesion that did not involve arbitration would also be unconscionable under West Virginia's state law. Pet. App. 41a. The Court found that Mr. Dunlap, with his claim for $8.46, and other Friedman's customers with similarly small claims, would not have been able to effectively vindicate their rights without being permitted to proceed on a class action basis.

To the extent that any of the cases cited by Petitioners reach opposite conclusions contrary to this result, this reflects a difference between the varying law of exculpatory clauses in different states. There is a growing body of law around the nation addressing the issue of whether contracts of adhesion may prohibit consumers from bringing their claims on a class action basis in cases that do not involve arbitration. It is clear from this body of law that entirely apart from arbitration issues, different states have reached different results on the question. *Compare America Online v. Superior Court*, 90 Cal. App. 4th 1, 8 (2001) (forum selection clause that required consumers to bring claims in Virginia, a state which does not permit class actions, held unconscionable under California law because

consumers could not effectively vindicate their rights in this forum) (case not involving any arbitration clause), *with Gilman v. Wheat, First Securities*, 692 A.2d 454 (Md. 1997) (enforcing identical forum selection clause, as it was not unconscionable under Maryland law) (case not involving any arbitration clause).[2]

Friedman's cites to a great many cases that do not involve state law unconscionability issues, or state law limitations on exculpatory clauses, but instead address questions of federal statutory interpretation. Decisions such as *Randolph v. Green Tree*, 244 F.3d 814 (11th Cir. 2001) and *Johnson v. W. Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001), involve discussions of the language and legislative history of the Truth in Lending Act. These cases say nothing about what state law may or may not be with respect to exculpatory clauses.

B. The Decision Below Is Consistent With this Court's Decisions.

Petitioners excoriate the decision below as being counter to law, on the grounds that the FAA supposedly sweeps

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[2] This rule of Maryland state contract law, which differs from the law in some other states, explains why the Fourth Circuit's decision in *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002), does not conflict with the decision below but instead merely involves an application of a different state's contract law. The fact that the Fourth Circuit held that a contract involving Maryland residents and a Maryland business was not unconscionable because it banned class actions is an application of Maryland state law as expressed in the *Gilman* decision, and cannot be found to be in conflict with the decision below unless the FAA somehow preempts substantive state contract law by making the illegality of these types of provisions an issue of federal common law of contracts.

away state exculpatory law as it relates to the class action issue. This claim is simply incorrect. As set forth in Part I-B above, the FAA does not preempt generally applicable state law contract doctrines such as limitations on exculpatory clauses.

Petitioners attempt to get around this difficulty by claiming that any application of state law relating to exculpatory clauses to bans on class actions would necessarily bar arbitration in all cases where a class action might be pursued, and therefore that such law is preempted by the FAA. This argument is simply wrong on the merits, as there is nothing inherent to arbitration that bars class-wide relief. No one disputes that Petitioners could have drafted a contract that explicitly permits consumers to bring appropriate claims on a class action basis, but simply chose not to do so. No legal doctrine "forced" petitioners to draft their contract of adhesion in a way that would insure that their customers could never effectively vindicate their rights.

Petitioners also argue that the decision below is incorrect because West Virginia's law of exculpatory clauses is supposedly preempted by this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In fact, this Court's ruling in *Gilmer* that the right to bring a class action under the federal Age Discrimination in Employment Act (ADEA) might be waivable in an arbitration contract, 500 U.S. at 32, is readily distinguishable from this case. This Court's decision in *Gilmer* was based entirely on the text and legislative purpose of the ADEA, and was in no way an interpretation of any state's contract laws with respect to exculpatory contracts.

Gilmer is also very different from this case because in *Gilmer* there was no reason to imagine that a ban on class

actions would bar the plaintiff from effectively vindicating his substantive rights. The ADEA provides for greater individual relief in the form of unpaid wages, reinstatement, other equitable relief, liquidated damages, attorney fees and costs. *See* 29 U.S.C. § 626(b) (incorporating remedies available under 29 U.S.C. §216(b)). Congress apparently was aware of the fact that ADEA claims are very different from run of the mill consumer claims (such as Mr. Dunlap's claim relating to an illegal charge of $8.56), as class actions under the ADEA proceed on an "opt-in" basis and are not governed by Rule 23's opt-out provisions for mass claims. *See, e.g., Allen v. Marshall Field & Co.*, 93 F.R.D. 438, 441 (N.D. Ill 1982). The waiver of class-wide relief in consumer cases involving very small sums of money, such as the instant case, thus poses a far greater threat to plaintiffs' ability to enforce their rights. *See, e.g., Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

III. There is No Split of Authority on Whether the FAA Preempts State Contract Law Concerning Mutuality of Obligations and the Doctrine of Unconscionability.

Petitioners' assertion that the decision below exacerbates a conflict of authority on "whether Section 2 of the FAA preempts state law concerning mutuality of obligation to arbitrate" completely misses the mark. As set forth in Part I-B(1), supra, this Court has made clear that the FAA does not preempt generally applicable state law contract principles. Not one of the decisions cited by Petitioners holds that the FAA preempts such general state contract law principles of unconscionability as they would apply to a non-negotiable and one-sided arbitration provision. Although some of the decisions cited by Petitioners reach different results after

examining similar types of contracts, these results reflect variations in *state* contract law. Those laws in no way implicate the FAA's preemptive effect. Petitioners are unable to identify conflicting authority on the *federal* law issue of preemption that they raise because this Court has already answered the question conclusively in the negative.

The holding of the court below – that Petitioners' arbitration clause is unconscionable based in part on the one-sided nature of its obligations – involves a routine application of state contract law principles. In discussing the doctrine of unconscionability under West Virginia law, the court relied on its own precedent applying general statutory standards:

> The basic test is whether, in the light of the background and setting of the market, the needs of the particular trade or case, and the condition of the particular parties to the conduct or contract, the conduct involved is, or the contract or clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time the conduct occurs or is threatened or at the time of the making of the contract.

Pet. App. 14a (quoting *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854, 859-60 (W. Va. 1998) (quoting Uniform Consumer Credit Code, § 5.108 comment 3)). Based on the standards of unconscionability set forth in the Uniform Consumer Credit Code, the court held that "Friedman's retention of the right to use the courts for its most important remedies, at the same time that it denies that forum to Mr. Dunlap with respect to his most important remedies, meets our established criteria for unconscionability in the context of a

contract of adhesion." Pet. App. 31a n. 12. This application of the same state contract and consumer protection law standards as would apply to any other provision in Petitioner's contract documents does not conflict with any of the decisions cited in the petition for *certiorari*.

The differences in outcome in the state and federal court cases cited by Petitioners are based entirely on variations in state contract law, and not on conflicting interpretations of the FAA itself. In *Munoz v. Green Tree Financial Corp.*, 542 S.E.2d 360 (S.C. 2001), the court held that state contract law remains applicable under the FAA and that a one-sided consumer arbitration clause was enforceable because South Carolina law does not invalidate contracts based on a lack of mutuality of remedy. *Id.* at 364 and 365. Likewise, *Ex Parte McNaughten*, 728 So.2d 592 (Ala. 1998), enforced a one-sided employment arbitration clause in a case involving the FAA based on its finding that Alabama law's doctrine of mutuality of remedies only applied to the substantive remedies available to parties and not to procedures for obtaining such remedies. *Id.* at 598 (citing *General Securities Corp. v. Welton*, 135 So. 329, 335 (1931)). Similarly, *In re Firstmerit Bank*, 52 S.W.3d 749 (Tex. 2001) applied the Texas statutory standard of unconscionability in holding that a mobile home finance agreement's one-sided arbitration clause was enforceable. *Id.* at 757-58. Although the Texas Supreme Court found that several cases from federal courts on the question presented were persuasive, *id.* at 757 n. 35, the court did not hold that the standard of unconscionability it applied was a rule of federal law, let alone that federal law *preempted* Texas contract law.[3]

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[3] The same is true of *Wilson Electrical Contractors, Inc. v. Minnotte Contracting Corp.*, 878 F.2d 167 (6th Cir. 1989), which simply held that this Court's precedent did not require severance of an arbitration

These cases do not conflict with the decision below on any question of federal law because all hold that the FAA applies general principles of state contract law to arbitration agreements.

The decision below is also consistent with the Third Circuit's ruling in *Harris v. Green Tree Financial Corp.*, 183 F.3d 173 (3d Cir. 1999). Although *Harris* declared broadly that "substantive federal law stands for the proposition that parties to an arbitration agreement need not equally bind each other with respect to an arbitration agreement," *id.* at 180, the court did not hold that this principle would preempt state contract law rules requiring mutuality. Instead, *Harris* looked to state contract law as support for this holding and found that Pennsylvania did not require parties to an agreement to take on equivalent obligations in order to establish the mutuality of obligation. *Id.* at 181. This reference to state law was perfectly consistent with the court's holding that "federal courts may apply state law pursuant to Section two of the FAA," so that "generally applicable contract defenses may be applied to invalidate arbitration agreements without contravening the FAA." *Id.* at 179. In short, Petitioners fail to establish that there is *any* conflicting authority on whether the FAA preempts state contract law principles concerning unconscionability and/or the mutuality of obligations.

The decision below measuring Petitioners' non-negotiable and one-sided arbitration clause against West Virginia's general statutory standards of unconscionability is

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clause from the rest of a contract for purposes of determining the adequacy of consideration, *id.* at 169, and did not hold that the FAA preempts state contract law that would be the source of any consideration requirement in the first place.

therefore perfectly consistent not only with the cases cited in the petition for *certiorari*, but also with this Court's repeated interpretations of the FAA.

IV. The Lower Court's Ruling Is Supported by Three Independent Reasons, and if Any of Those Reasons Is Supported by Law then It Would Suffice to Justify the Result.

As the opinion below makes clear, the West Virginia Supreme Court found that the defendants' arbitration clause was substantively unconscionable for three independent and sufficient reasons. *E.g.* Pet. App. 31a, n.12 (lack of even-handedness in one-way nature of the clause was an "additional and independently adequate" ground for the court's holding). The Court also noted that under generally applicable West Virginia law, it would not re-write a contract of adhesion with the goal of stripping out individual unconscionable provisions so that the entire clause would be enforceable. Pet. App. 38-40. Accordingly, this Court should not grant *certiorari* in this case if the decision of the Court below was correct, or not in conflict with some other authority, with respect to any one of the three separate provisions of the contract that the court below held to be unconscionable.

The decision of the Court below not to rewrite the clause is an entirely legitimate exercise of generally applicable state law. Petitioners' request to the West Virginia Supreme Court that it re-write or sever any of these three provisions would merely be a unilateral offer to amend, that need not be accepted. *See* Pet. App. 39, *citing Flyer Printing Co. v. Hill*, 805 So. 2d 829 (Fla. Ct. App. 2001) (corporation may not mend an unenforceable arbitration clause by offering during litigation to pay all costs, because this was "a unilateral offer to amend

the agreement," and, "we are not authorized to remake the parties' contract."). *See also Popovich v. McDonald's*, 189 F. Supp. 2d 772, 779 (N.D. Ill. 2002) ("McDonald's offer, which is inconsistent with the parties' contract, amounts to an offer for a new contract. Popovich is under no obligation to accept McDonald's offer, and the court is in no position to impose it. As a matter of elementary contract law, McDonald's cannot unilaterally modify the existing agreement.")

In addition, as the Court below recognized, Pet. App. 40, it is improper for courts to interject themselves into bargains and re-write adhesion contracts to fix illegal or unconscionable provisions. This decision is not surprising or unusual. *See* Restatement (Second) of Contracts § 184 cmt. b ("a court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable.")

CONCLUSION

The petition for a writ of *certiorari* should be denied.

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(3)

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IN THE

Supreme Court of the United States

FRIEDMAN'S INC. D/B/A FRIEDMAN'S JEWELERS, AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, INC., and AMERICAN BANKERS LIFE ASSURANCE COMPANY OF FLORIDA,

Petitioners,

v.

STATE OF WEST VIRGINIA *EX REL.* JAMES DUNLAP,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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REPLY FOR THE PETITIONERS

1. **Introduction**. Respondent does not, and cannot, seriously dispute the central showings of the petition — the triple conflict created by the decision below (whether parties to an arbitration agreement may forgo class-action procedures as a matter of federal law; whether they may agree to forgo punitive damages as a matter of federal law; and whether Section 2 of the Federal Arbitration Act ("FAA") preempts state law regarding mutuality of obligation to arbitrate), or the importance and recurring nature of these questions to the effective use of arbitration to promote interstate and international commerce. *See* Pet. 7-21; *id.* at 22-25.

Rather, respondent opposes review on two grounds as incredible and breathtaking as the decision below — that "this case is not really about arbitration," and that there is no real conflict here because the decision below is state-law-dependent and "[n]one of the decisions from other jurisdictions cited by Petitioners involves determinations of West Virginia's state law of exculpatory clauses." Opp. 1-2. The former claim is belied by the decision itself, and the latter claim — that petitioners must show a conflict of *West Virginia law* to merit *U.S. Supreme Court review* — is a strategic misunderstanding of petitioners' showings, which demonstrate multiple conflicts of federal law.

Finally, respondent's repeated insistence that the decision below is "routine" (Opp. 13) and "straightforward" (Opp. 17) is truly remarkable. Trial Lawyers for Public Justice ("TLPJ"), which now represents the respondent, earlier described the decision as "groundbreaking" (*Court Throws Out Arbitration Clause With Bar on Class Actions*, June 17, 2002, http://www.tlpj.org/News_PDF/fall-02/06-17-02-adr.pdf) and as "send[ing] a powerful message to businesses." *West Virginia's Highest Court Holds That Arbitration Clauses Cannot Be Used to Eliminate Consumers' Rights*, http://www.tlpj.org/pressreleases/friedmans.htm. These non-

litigation-induced descriptions of the decision below are the more accurate ones, and show why certiorari should be granted.

2. **The Three Conflicts**. Respondent ignores many of the decisions that conflict with the decision below. In those few instances where respondent does try to harmonize the decision below with the numerous conflicting decisions of this Court and lower courts, he relies on immaterial factual distinctions or fundamentally misunderstands the reasoning employed in those decisions. Opp. 10-12, 13-16, 17-20, 22-24.

a. **The Punitive-Damages Conflict**. Petitioners showed (Pet. 11-15) that the decision below deepened an existing split of authority on the question of whether parties to FAA-covered arbitration agreements may agree to eliminate punitive damages liability. Respondent contends that "there can be no split of authority" because that question is a matter of "West Virginia state contract law." Opp. 9. This is a ***non sequitur***, as respondent later concedes by agreeing that a conflict might exist "to the extent that the FAA might ever be construed to preempt" that state law. Opp. 10. That is, of course, exactly the issue raised in the decision below, presented in the petition, and the subject of the conflict — whether state law or policy preferences favoring the imposition of punitive damages may be applied to invalidate an FAA-covered arbitration agreement in which the parties agree to forgo such damages.

When respondent does attempt to explain away the conflict of authority, his arguments fail. He contends that petitioners "have identified no authority that conflicts with the West Virginia Supreme Court's decision." Opp. 12. Yet, respondent makes no attempt to harmonize the decision below with directly conflicting decisions of the Fourth, Fifth, Eighth, Ninth, and Tenth Circuits or with contrary decisions of the Second Circuit and Illinois Supreme Court, all of which were cited in the petition. Pet. 12-15.

Respondent does address three of the conflicting decisions, where he asserts that decisions of the First, Seventh, and Eleventh Circuits may be reconciled on the "factual circumstance[]" that each involved challenges to an arbitrator's decision to award punitive damages. Opp. 10-11. That factual distinction is immaterial. Each of these decisions plainly holds that the availability or absence of punitive damages in arbitration is, as a matter of federal law, governed by the parties' agreement, not by individualized state laws or policies. *See Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1189 (11th Cir. 1995); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994); *Raytheon Co. v. Automated Bus. Sys., Inc.*, 882 F.2d 6, 12 (1st Cir. 1989). Similarly unavailing is respondent's statement that these decisions relied on federal law "rather than state law." Opp. 11. In fact, this purported distinction only confirms the error of the decision below and the split of authority it engenders: Federal law provides that, ***under the FAA***, parties may contract for the availability or absence of punitive damages, contrary state law or policy preferences notwithstanding.

Finally, respondent's attempt (Opp. 16) to minimize the conflict with *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), is ineffectual. As explained in the petition (Pet. 11-12), *Mastrobuono* approved an argument that, under the FAA, "the parties to a contract may lawfully agree to limit the issues to be arbitrated by *waiving* any claim for punitive damages" just as they may "agree to *include* claims for punitive damages within the issues to arbitrated." 514 U.S. at 58 (first emphasis added). Either way, "the FAA ensures that their agreement will be enforced according to its terms." *Id.* Furthermore, respondent's contention that *Mastrobuono* "did not involve a generally applicable body of state law, such as that applied by the court below" (Opp. 16) is demonstrably wrong. In fact, as the Court noted in the first sentence of its opinion, "New York law" of punitive damages,

which supplied the backdrop to the arbitration agreement at issue, "allows courts, ***but not arbitrators***, to award punitive damages." 514 U.S. at 53 (emphasis added). Nonetheless, despite state law precluding the award of punitive damages by arbitrators, the Court held as a matter of federal law that the "FAA ensures that [the parties' arbitration] agreement will be enforced according to its terms" (*id.* at 58) and found that, in the agreement at issue, "the text of the arbitration clause itself surely does not support — indeed, it contradicts — the conclusion that the parties agreed to foreclose claims for punitive damages." *Id.* at 61.*

b. **The Class-Action Conflict**. Petitioners also showed (Pet. 8-11) that the decision below created a split of authority on the question of whether an arbitration agreement may be invalidated on the ground that it does not provide for class-action procedures.

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* Respondent's repeated suggestion (Opp. 11-12, 15-16) that the decision below is consistent with decisions of this Court stating that arbitration clauses must allow parties to "effectively vindicate" statutory rights is both irrelevant and wrong. It is irrelevant because, as the court below expressly stated, the only statutory right at issue in this case is under the West Virginia Consumer Credit & Protection Act, which does not contain a statutory entitlement to punitive damages. Pet. 14 (citing Pet. App. 26a n.8). Thus, the West Virginia legislature has already conclusively decided that punitive damages are not necessary to "effectively vindicate" any right under the Act. Respondent's contention that this Court's precedent establishes a well-settled and absolute bar to the waiving of certain remedies in arbitration agreements is also wrong. In fact, the Court recently granted certiorari in *Pacificare Health Systems, Inc. v. Book*, 123 S. Ct. 409 (granted Oct. 15, 2002), to determine the validity of an arbitration agreement that did not allow an arbitrator to award punitive damages for RICO violations. *See* Pet. for Cert., *Pacificare Health Sys., Inc. v. Book*, S. Ct. No. 02-215 (granted Oct. 15, 2002), at i. Although *Pacificare*, unlike this case, involves no question of state-law policy preferences (nor, for that matter, does it involve questions of purported class-action or mutuality rights), the Court's decision in *Pacificare* may nonetheless shed significant light on the question of whether, and to what degree, parties may waive statutory or other remedies in an arbitration agreement.

Respondent contends (Opp. 17-18) that the invalidation of the arbitration agreement on this ground was "straightforward" and created no conflict of authority. Neither contention is correct. As noted at p. 1, above, TLPJ has itself described the decision on this issue as "groundbreaking." And indeed it is. Respondent has not cited a single case in which a federal court of appeals or state court of last resort has issued a similar decision. Instead, respondent offers two cases that, by his own admission, concern forum-selection clauses, not arbitration clauses. Opp. 17. The relevance of these cases is neither evident nor adequately explained.

Respondent then adds the further, incongruous arguments that there is no conflict of authority because decisions cited in the petition reaching "opposite conclusions . . . reflect[] a difference between varying law of exculpatory clauses in different states," and because the petition cites "a great many cases that do not involve state law unconscionability issues." Opp. 17-18. The first argument, which is unburdened by authority, is wrong. Even a cursory examination of the conflicting cases cited in the petition demonstrates that each held, ***as a matter of federal law***, that parties to an FAA-covered arbitration agreement may agree to preclude class actions. Pet. 9-11. The second argument is (again) a ***non sequitur***. Respondent (again) admits that a conflict of authority may be found if the "FAA somehow preempts substantive state contract law." Opp. 18 n.2; ***see id.*** at 12. But (again) this is exactly the issue raised by the decision below and presented in the petition — whether state law favoring class-action proceedings may be applied to invalidate an FAA-covered arbitration agreement in which the parties agree to forgo such procedures.

Respondent's attempt (Opp. 18-20) to sweep away ***Gilmer v. Interstate/Johnson Lane Corp.***, 500 U.S. 20 (1991), likewise fails. It is true that ***Gilmer*** involved a dispute under the Age Discrimination in Employment Act of 1967. But that decision

expressly rejected the very argument that respondent relies upon — that the absence of class-action procedures would prevent "adequate" enforcement of legal rights. *Id.* at 32. Moreover, respondent shows no awareness of the inconsistency of his and the West Virginia court's positions — his contention (Opp. 19-20), embraced by the court below (Pet. App. 27a), that his claims are too monetarily slight to be effectively vindicated absent class-action procedures cannot be reconciled with the court's rejection of his argument that the cost of arbitrating his claim is prohibitive. Pet. App. 32a-37a. This inconsistency in reasoning and result further confirms the West Virginia courts' hostility to arbitral fora and its intent to foil arbitration agreements on any (and all) conceivable grounds.

Respondent is, at least, honest about his position — he says that state law may, consistent with the FAA, require arbitration contracts to include a term that "explicitly permits consumers to bring appropriate claims on a class action basis." Opp. 19. But respondent seems unaware that this requirement impermissibly takes aim at arbitration *qua* arbitration — arbitration is, by definition, *not* court litigation. As the Seventh Circuit has held, a stipulation "that disputes will be submitted to arbitration" inherently requires relinquishment of "certain procedural niceties which are normally associated with a formal trial." *Champ v. Siegel Trading Co.*, 55 F.3d 269, 276 (7th Cir. 1995). One such procedural nicety is the "possibility of pursuing a class action" (*id.*), something the *Gilmer* Court plainly understood in its refusal to invalidate an arbitration agreement that did not provide for class-action procedures. *See* 500 U.S. at 32 (by definition, arbitrations are "individual attempts at conciliation"). A state-law requirement that arbitration agreements provide class procedures would strike at the heart of the FAA's aim of overcoming "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants." *Rodriguez de*

Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989).

Finally, review here is needed because the decision below is already being used as a wedge to widen the newly-created split of authority. In *Leonard v. Terminix International Co.*, No. 1010555, 2002 WL 31341084 (Ala. Oct. 18, 2002) — decided after the petition was filed — a deeply divided Alabama Supreme Court relied on the decision below to hold that an arbitration agreement precluding class-action procedures was unenforceable. *Id.* at *6-*8. The court so held despite acknowledging that such a result was in marked tension with this Court's precedent (*id.* at *5) and despite prior Alabama Supreme Court cases suggesting a contrary result. *See id.* at *11 (Woodall, J., dissenting); Pet. 10-11. This Court's immediate review is necessary to prevent any further widening of the rift and concomitant diminution of the effectiveness of arbitration agreements.

c. **The "Mutuality" Conflict**. Petitioner further showed (Pet. 15-20) that the decision below deepened a split of authority on the question of whether the FAA preempts state law concerning mutuality of obligation to arbitrate. Respondent says (Opp. 20) there is no conflict. Respondent is wrong. There is a deep, and long-standing, split on this issue that requires this Court's attention.

Respondent again contends that the decision below merely represents a "routine application" of "generally applicable state contract law principles." Opp. 20-21. It does not. Respondent's selective quotation of *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854 (W. Va. 1998), omits the key passage relied on by the court below:

> Where an ***arbitration agreement*** entered into as part of a consumer loan transaction contains a substantial waiver of the borrower's rights, including access to the courts, while preserving the lender's right to a judicial forum, the agreement

> is unconscionable and, therefore, void and unenforceable as a matter of law.

Id. at 862 (emphasis added; cited at Pet. App. 31a n.12). On its face, therefore, the voiding rule employed by the court below is directed to arbitration agreements specifically, not to contracts generally — which runs directly contrary to numerous decisions of this Court. *See* Pet. 6-7, 16-17.

Furthermore, respondent's insistence (Opp. 22) that "differences in outcome in the state and federal court cases cited by Petitioners are based entirely on variations in state contract law" is demonstrably wrong.

None of the conflicting decisions issued by state courts of last resort was based on state-law grounds. In ***Ex Parte McNaughton***, 728 So. 2d 592 (Ala. 1999), the Alabama Supreme Court expressly held that any invalidation of an arbitration agreement on mutuality-of-remedy grounds "flies in the face of [***Doctor's Associates, Inc. v. Casarotto***, 517 U.S. 681, 687 (1996)], . . . where the Supreme Court of the United States explicitly stated that '[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration agreements.'" *Id.* at 598-99. Thus, on its face, the *McNaughton* holding turns on federal law and an express rejection of contrary state law. The South Carolina Supreme Court's decision in ***Munoz v. Green Tree Financial Corp.***, 542 S.E.2d 360 (S.C. 2001), expressly relied on *McNaughton*'s reasoning to reach the same result. *Id.* at 365. *Munoz*'s only mention of state law concerning mutuality was an aside after the court had grounded its holding in federal law. *Id.* Finally, in ***In re FirstMerit Bank, N.A.***, 52 S.W.3d 749 (Tex. 2001), the Texas Supreme Court expressly rejected cases holding that state law of mutuality of remedy may void arbitration contracts (*id.* at 757 & n.34) in favor

of the "weight of federal precedent" holding to the contrary. *Id.* at 757-58 & n.35.

Respondent's attempt to harmonize conflicting federal decisions fares no better. In *Wilson Electrical Contractors, Inc. v. Minnotte Contracting Corp.*, 878 F.2d 167 (6th Cir. 1989), the Sixth Circuit rejected any mutuality-of-obligation prerequisite to enforcing an arbitration agreement, expressly basing that rejection on this Court's decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), not upon Ohio's (or any other state's) contract law. *See* 878 F.2d at 169. Any other result, the court held, would reflect "the old judicial hostility to arbitration." *Id.* Likewise, as respondent concedes (Opp. 23), the Third Circuit in *Harris v. Green Tree Financial Corp.*, 183 F.3d 173 (3d Cir. 1999), expressly held that "*substantive federal law* stands for the proposition that parties to an arbitration agreement need not equally bind each other with respect to an arbitration agreement if they have provided each other with consideration beyond the promise to arbitrate." *Id.* at 180 (emphasis added). It is true, as respondent states (Opp. 23), that the *Harris* court, like the South Carolina court in *Munoz*, made a "reference to state law" after reaching this conclusion. But in context, it is plain that this "reference" was only that. The decision rested on federal-law grounds.

3. **The Importance of the Issues**. TLPJ was correct when, prior to being retained to author the Brief in Opposition, it described the decision below as "groundbreaking" and "send[ing] a powerful message to businesses." *See* p. 1, above. Unfortunately, the "powerful message" that the decision below sends is that any arbitration agreement that deviates in any way from the full panoply of procedures and remedies available in judicial proceedings will be unenforceable in West Virginia. Pet. App. 14a-16a n.3. This "judicial hostility to arbitration agreements" (*Gilmer*, 500 U.S. at 25), of course, strips them of

their core value — prompt, inexpensive, and uniform resolution of disputes. *See* Pet. 23. (Were there any doubt about the West Virginia court's raw hostility to arbitration, it would be eliminated by the court's almost-but-not-quite holding that arbitration agreements are unconscionable deprivations of the right to jury trials, *see* Pet. App. 21a-25a; Pet. 20-22 n.4.)

And, as demonstrated in the petition, the result of this hostility will be to push more disputes back into overloaded judicial systems and to impede interstate and international commerce. Pet. at 22-24. Indeed, notwithstanding respondent's claimed concerns about ***de minimis*** claims being left unlitigated (Opp. 17), it is certainly the case that wide-ranging class litigation such as that sought by respondent will cost companies like Friedman's far more in litigation costs and potential punitive awards; the result of such increased transactional costs will be an increase in consumer prices — most likely in excess of the amounts that respondent claims to have been deprived. *See, e.g.*, S. Ware, ***Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements***, 2001 J. Disp. Resol. 89, 93-100. But Congress, in the FAA, already balanced these policy choices in favor of arbitration and commerce, not in favor of litigation and trial lawyers.

These unfortunate consequences of the decision below, none of which is challenged by respondent, are antithetical to the FAA's "declared . . . national policy favoring arbitration." ***Southland Corp. v. Keating***, 465 U.S. 1, 10 (1984). This Court should grant certiorari to resolve these issues on a national basis.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

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